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Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

DEBORAH A. MAYER,
Petitioner,

v.

MONROE COUNTY COMMUNITY SCHOOL CORPORATION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL L. SCHULTZ
Counsel of Record
PARR, RICHEY, OBREMSKEY & MORTON
225 W. MAIN STREET
P.O. Box 668
LEBANON, IN 46052
(765) 482-0110

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether, and under what circumstances, the free speech clause of the First Amendment limits a public school board's power to punish a teacher's instructional speech where such speech is part and parcel of the approved curriculum and involves a matter of great public concern.

RULE 14.1 (b) STATEMENT

A list of all parties to the proceeding in the court whose judgment in the subject of this petition is as follows:

Plaintiff-Appellant and Petitioner: Deborah A. Mayer

Defendants-Appellees and Respondents: Monroe County Community School Corporation ("MCCSC"); John Maloy, individually and in his representative and official capacities as Superintendent; Cheryl Brown, individually and in her representative and official capacities as President of the School Board; Victoria Rogers, individually and in her representative and official capacities as Principal of Clear Creek Elementary School; and Pam Sklar, individually and in her representative and official capacities as Director of Human Resources for the School Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Deborah A. Mayer ("Mayer") respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit, dated January 24, 2007 (Rehearing and Rehearing En Banc Denied March 12, 2007), is officially reported at 474 F.2d 477, and is reproduced at App. B, 3a-8a.

The Entry Granting Defendants' Motion for Summary Judgment of the U.S. District Court for the Southern District of Indiana, Indianapolis Division, dated March 10, 2006, is unofficially reported at 2006 WL 693555 and is reproduced at App. C, 9a-48a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Seventh Circuit sought to be reviewed was entered on January 24, 2007. The Court of Appeals denied Mayer's petition for rehearing on March 12, 2007. App. A, 1a-2a. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the date of the denial of the petition for rehearing. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . .

STATEMENT OF THE CASE

A. Factual Background

On January 10, 2003, Petitioner Deborah Mayer led her multi-age class at Clear Creek Elementary in a discussion using the December 13, 2002 edition of *Time For Kids* magazine, a national publication which was part of the approved curriculum. App. 12a and 36a.[1] Such classroom

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[1] There is no question that the lesson Mayer was teaching was part of the approved curriculum. The *Time for Kids* magazine was "part of the approved curriculum at Clear Creek. . . ." App. 12a. More importantly, the magazine itself included a discussion of peace marches. *Id.* The concept of war protests or peace demonstrations was, by necessary implication, part of the approved curriculum, as was the concept of

discussion of current events was something Mayer did with her class nearly every Friday. *Id.* The *Time for Kids* article in question included coverage of "peace marches in Washington, D.C. conducted in protest of U.S. involvement in the war in Iraq." App. 12a, 50a-52a. This case arises from punishment suffered by Mayer, including retaliatory acts and ultimately her discharge, which resulted from Mayer's honest answer to a student's question during this classroom discussion. Mayer described the speech she claims is protected as follows:

> Q. Tell me about that discussion in January.
>
> A. After we had talked about some of the other things that had happened, one of the kids asked me – and we had read the article about the peace march in Washington, D.C., one of the kids asked me if I would ever march in a peace march. At that time I said, "Peace marches are going on all over the country. We even have demonstrations here in Bloomington, Indiana. When I drive past the courthouse square and the demonstrators are picketing I honk my horn for peace because their signs say, 'Honk for peace.'" And then I went on to say that I thought that it was important for people to seek out peaceful solutions to problems before going to war and that we train kids to be mediators on the playground so that they can seek out peaceful solutions to their own problems and so they won't fight and hurt each other. And that

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differing opinions about the looming conflict in Iraq. Therefore, Mayer's comment about honking for peace did not deviate in any way from the approved curriculum.

> was the extent of the conversation and the discussion.

App. 13a.

The *Time for Kids* article approved by the school's board for use with all Clear Creek elementary students (including Mayer's) included frank coverage of a number of key aspects of the then-looming war in Iraq. It said "[t]he U.S. and Great Britain claim they have information showing that Iraq has been developing 'weapons of mass destruction.'" App. 51a. The article referred to President Bush's statement that "[a]ny delay, deception or defiance [regarding the U.N. deadline for Iraq to declare its WMDs] will prove Saddam Hussein has rejected the path of peace." *Id.* Most importantly, under the heading "On the Brink of War," the article included a discussion of the fact that there were differing opinions among Americans regarding the propriety of Bush's Iraq policy:

> Opinion polls show that 58% of Americans would support such an attack. Still, many are speaking out against it. A big antiwar rally is scheduled in Washington, D.C., this week. "There are other ways to deal with [Hussein] besides bombing," says peace activist Elke Heitmeyer. "Wars will only create more violence."

App. 52a.

The school district had no policy against discussing peace in the context of war and had never instructed Mayer or any other teacher to avoid the subject prior to Mayer's "Honk for

Peace" comment. App. 36a-37a.[2] Thus, Mayer's comment violated no curriculum choice made by the school and did not contravene any directive from superiors about how to discuss current events with her class. Only after the comment did the school's principal decide to prohibit speech about peace. Almost immediately after Mayer made her "Honk for Peace" comment some parents complained to the school's principal about Mayer's discussion of the looming Iraq war. App. 14a. At a subsequent meeting between the parents, Mayer, and the principal, the principal unilaterally prohibited Mayer from discussing peace in her classroom. *Id.* Then, the same day, the principal unilaterally cancelled the school's traditional "Peace Month," releasing a memo entitled "Peace at Clear Creek" to all of the school's teachers. App. 14a-15a. Mayer never again spoke with her class about peace as an alternative to war.

Despite the fact that Mayer's peace comments were part and parcel of a discussion of approved curriculum with her class, Mayer was subjected to retaliatory acts and, ultimately, terminated by the school corporation because of her comments. App. 4a. Mayer then brought this action under 42 U.S.C. § 1983 seeking reinstatement and damages.

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[2] The district court did not find the lack of any prior prohibition on the comment important:

> Here, the fact that Ms. Mayer's January 10, 2003 comments were made prior to any prohibitions by school officials does not establish that she had a First Amendment right to make these comments in the first place.

App. C, 36a-37a.

B. Procedural History

1. Mayer filed her complaint in this case on October 5, 2004 in the Monroe County (Indiana) Superior Court. The case was subsequently removed to the United States District Court for the Southern District of Indiana by Defendants[3] on October 18, 2004. In her complaint, Mayer invoked the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act of 1871, Title 42 U.S.C. § 1983. Mayer claimed, among other things, that Defendants retaliated against her because of her exercise of her First Amendment right to free speech by subjecting her to adverse actions including, but not limited to, systematically and maliciously scrutinizing and criticizing her work and wrongfully discharging her from her employment with the Monroe County Community School Corporation.

After discovery, Defendants filed a motion for summary judgment on September 26, 2005. The motion was fully briefed by December 29, 2005. The district court granted the school's motion for summary judgment in an entry dated March 10, 2006, and entered its judgment the same day. App. 48a-49a.

2. In dismissing Mayer's First Amendment claims, the district court did not reach the question of whether MCCSC was justified in imposing restrictions on Mayer's speech or expression; *i.e.*, it did not conduct the familiar *Pickering* balancing typical in cases such as this one. Instead the district court held:

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[3] Defendants are referred to collectively throughout this petition as "MCCSC" or "the school."

> In summary, because the uncontroverted facts establish that Ms. Mayer expressed her views to her students at a time and place and as part of her official classroom instruction, she was acting as an "employee," rather than as a "citizen," so that her speech was not constitutionally protected. Thus, we do not need to undertake the kind of balancing called for in *Pickering*.

App. 37a. Nor did the court make any determination regarding the existence of any material, disputed facts pertaining to Mayer's First Amendment claims.[4] The district court's Entry did not discuss, for example, whether Mayer had produced sufficient evidence that her speech on a matter of public concern had been chilled by MCCSC, or whether there was sufficient evidence of pretext regarding MCCSC's alleged reason for terminating Mayer's contract to preclude summary judgment. Rather, the district court concluded that respondents did not violate Mayer's First Amendment rights in any way, holding that in-class speech by a teacher is never protected because teachers in class speak only as employees and never as citizens. App. 37a. In reaching this conclusion, the district court found that the balance set out by this Court in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L. Ed. 2d 731 (1969), between the student's right to speak and the school's need to protect against disruption of the educational mission, does not

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[4] Although the district court's Entry devoted a great many pages (*see* App. 12a-28a) to what the court called a "Factual Background," its dismissal of Mayer's First Amendment claims – that her speech was unconstitutionally chilled and that she was discharged in retaliation for that speech – turned solely on the court's finding that her speech was not protected as a matter of law. App. 37a-38a.

apply where the school seeks to categorically prohibit speech on an important public issue by *teachers*. App. 35a.

The district court relied on two circuit decisions – *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998) and *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989) – as support for the proposition that a school board's right to control curriculum absolutely and always defeats any right a teacher may have to comment on matters of public concern. App. 34a-38a. The district court also apparently concluded that when Mayer answered her student's question about peace marches she (Mayer) was arrogating control over the curriculum. App. 37a. The court said: "[t]he point is that whatever the school board adopts as policy regarding what teachers are permitted to express in terms of their opinions on current events during the instructional period, that policy controls and there is no First amendment right permitting teachers to do otherwise." *Id.*[5] The court cited and quoted from *James v. Board of Education*, 461 F.2d 566 (2nd Cir. 1972),[6] but offered no

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[5] It is important to keep in mind that, as the district court acknowledged, the school had no policy in place prohibiting the expression of opinions on current events when Mayer made her peace comment. App. 36a. Thus, the district court's holding that Mayer's speech was not protected cannot rest on a policy or curriculum violation. Properly understood, the district court said simply that teachers can be punished or fired for what they say in class regardless of whether their otherwise presumably protected speech was within or without the curriculum or policy of the school. In short, contrary to *Tinker*, the district court held that teachers (unlike students) do, in fact, check their First Amendment rights at the classroom door.

[6] The Second Circuit in *James* considered nearly identical issues and very similar facts but reached a conclusion opposite of that of the district court in this case. 461 F.2d at 573-576.

explanation or discussion of why it refused to follow the reasoning in *James*.

3. Mayer timely appealed to the U.S. Court of Appeals for the Seventh Circuit, which had jurisdiction of the appeal pursuant to 28 U.S.C. § 1291. On January 24, 2007, the Seventh Circuit affirmed the entry of the district court granting MCCSC's motion for summary judgment. App. 3a-8a. The Seventh Circuit reached the same result as the district court and affirmed the lower court's decision following very much the same analysis. First the court assumed that Mayer was, in fact, terminated because of her speech. App. 4a. The court then assumed (incorrectly) that the district court had engaged in *Pickering* balancing of the school's interests in accomplishing its educational mission versus Mayer's interest in expressing her views on a subject of great public importance, and observed (again incorrectly) that the district court concluded that the "employer's interests predominate." App. 4a.[7] Finally, the court went on to reason essentially as follows: (1) public school teachers are hired to present curriculum and have no First Amendment right to say anything – ever – in class that might deviate from that curriculum or "to present personal views to captive audiences against the instructions of elected officials." App. 7a;[8] (2)

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[7] The district court flatly refused to engage in *Pickering* balancing. App. 37a.

[8] The Seventh Circuit expressly noted its disapproval of contrary holdings on this point in other circuits: "To the extent that *James v. Board of Education* . . . and *Cockrel v. Shelby County School District* . . . are to the contrary, they are inconsistent with later authority and unpersuasive." App. 7a (citations omitted).

"*Garcetti* applies directly [to this case]"[9]; and (3) since Mayer expressed her peace opinion in class and against the instruction of elected officials[10], her First Amendment claim must fail. App. 7a-8a. The Seventh Circuit's opinion stands for the proposition that the First Amendment offers no protection whatsoever to a teacher's in-class speech, regardless of whether that speech is entirely consistent with approved curriculum, and regardless of the relative importance of the matter of public concern contained in the classroom speech.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for at least four (4) reasons: First, the Court has never decided whether elementary or secondary school teachers have any First Amendment protection for their speech in the classroom, while the circuit courts have developed competing and inconsistent tests. Second, the Seventh Circuit's exceedingly narrow view that instructional speech is never protected conflicts with decisions of other circuits as well as the spirit of prior holdings of this Court. Third, the Seventh Circuit's application of *Garcetti v. Ceballos* to speech in an elementary school classroom unduly restricts a fundamental American freedom. And, fourth, the particular circumstances of this case warrant granting the petition to correct an injustice caused by the Seventh Circuit's misperception of a critical

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[9] This Court decided *Garcetti v. Ceballos*, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), on May 30, 2006, just after Mayer filed her notice of appeal.

[10] As noted above, no elected officials had instructed Mayer about expressing an opinion prior to the time she presented the *Time for Kids* article for discussion. This apparent mistake in the panel's understanding of the facts was the basis for Mayer's petition for rehearing.

fact. These reasons for granting the petition are addressed in turn.

I. THIS COURT HAS NEVER DECIDED WHETHER ELEMENTARY SCHOOL TEACHERS HAVE ANY FIRST AMENDMENT PROTECTION FOR THEIR SPEECH IN THE CLASSROOM, AND THE CIRCUIT COURTS HAVE CREATED CONFLICTING TESTS.

This Court has never squarely considered whether or under what circumstances a public school teacher's instructional speech is entitled to First Amendment protection. However, this Court historically has afforded special attention to the public school environment when considering First Amendment ramifications of speech in schools. The landmark decision in *Tinker* put an exclamation point at the end of a long line of precedents that sought to balance the competing interests of states, school boards, students, and teachers with respect to who controls the discourse in American schools:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this court for almost 50 years.

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506, 89 S.Ct. 733, 736, (1969).

Shortly before deciding *Tinker* this Court wrestled with the level of First Amendment protection to be afforded teachers speaking outside the classroom on matters of public

concern. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Since *Pickering* and *Tinker*, the Court has examined the propriety of restrictions imposed on the content of student newspapers where the speech may be said to carry the imprimatur of the school, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), and has considered in-school speech in other contexts, *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (plainly offensive speech by student), but has not squarely addressed the question presented in this petition regarding instructional speech by an elementary school teacher.

The circuit courts have developed varying approaches to determining First Amendment rights of teachers regarding instructional speech. Three general approaches have emerged. One uses an approach similar to this Court's analysis in *Hazelwood*. This approach examines the classroom speech from the standpoint of whether or not the speech appears to bear the imprimatur of the school and then balances the interests of the school against those of the speaker. This test in various iterations has been applied to instructional speech by the First Circuit in *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993), the Second Circuit in *Silano v. Sag Harbor Union Free School Dist. Bd. of Educ.*, 42 F.3d 719 (2nd Cir. 1994), the Seventh Circuit in *Webster v. New Lenox School Dist. No. 122*, 917 F.2d 1004 (7th Cir. 1990), the Eighth Circuit in *Lacks v. Ferguson Reorganized School Dist. R-2*, 147 F.3d 718 (8th Cir. 1998), and the Tenth Circuit in *Vanderhurst v. Colorado Mountain College Dist.*, 208 F.3d 908 (10th Cir. 2000) and *Miles v. Denver Public Schools*, 944 F.2d 773 (10th Cir. 1991).

A second test, generally referred to as the *Pickering-Connick* test, also balances the interests of the government as employer against the First Amendment rights of the government employee speaking. This test has been applied to instructional speech by the Second Circuit in *James v. Board of Education*, 461 F.2d 566 (2nd Cir. 1972), the Fourth Circuit in *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1998), the Fifth Circuit in *Kirkland v. Northside Independent School Dist.*, 890 F.2d 794 (5th Cir. 1989), and the Ninth Circuit in *Nicholson v. Board of Educ. Torrance Unified School Dist.*, 682 F.2d 858 (9th Cir. 1998).

Finally, at least one case has applied the analysis commonly referred to as *Rust-Rosenberger* to instructional speech (at the college level). *Edwards v. California University of Pennsylvania*, 156 F.3d 488 (3rd Cir. 1998).

The cases employing *Hazelwood* tend to be the most protective of speech, while the *Rust-Rosenberger* analysis appears to provide the least protection. Under *Pickering-Connick*, there is the added requirement that the teacher establish that his or her speech relates to a matter of public concern before First Amendment protections apply. Regardless of what approach has been used, however, all of the circuits have engaged in balancing of the rights or interests of the school or school board against the rights of teachers. No case prior to the Seventh Circuit's opinion below has effectively and categorically shut the First Amendment out of the classroom (at least as far as teachers' instructional speech is concerned) and refused to engage in any balancing of interests.

Teachers need to know if their in-class speech is ever entitled to First Amendment protection and, if so, when. With well over three million elementary and secondary public

school teachers nationwide,[11] this is an issue in dire need of clarification. If teachers like Ms. Mayer can be fired simply for answering a student's question about approved curriculum, they need and deserve ample warning so they can censor themselves accordingly. If, on the other hand, we want as a nation to let our public school teachers teach, then this Court should make it clear that school boards cannot arbitrarily punish teachers for fostering lively discussion and then justify the punishment by claiming some generalized interest in controlling curriculum or maintaining order.

II. THE SEVENTH CIRCUIT'S VIEW THAT THE FIRST AMENDMENT NEVER PROTECTS TEACHERS' IN-CLASS SPEECH CONFLICTS WITH THE SPIRIT AND REASONING OF THIS COURT'S DECISION IN *TINKER*, AND IS IN DIRECT CONFLICT WITH DECISIONS OF THE SECOND AND SIXTH CIRCUITS IN *JAMES* AND *COCKRELL*, AS WELL AS OTHERS.

Various circuit court opinions have recognized the limited right of public school teachers to engage in speech with their class or comment on matters of public concern in circumstances similar to those presented here, but have wrestled with what the proper test should be. For example, in *James* the Second Circuit held that where the Board of Education submitted no evidence that the teacher's speech "threatened to disrupt classroom activities or created any disruption in the school," the regulation of the teacher's in-class speech was unconstitutional. 461 F.2d at 572. The

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[11] The U.S. Department of Education's National Center for Education Statistics has projected that as of 2008 there will be 3,209,000 public elementary and secondary school teachers in service. *See* http://nces.ed.gov/programs/digest/d05/tables/dt05_004.asp.

court in *James* rejected the Board's claim that *Tinker* did not govern the teacher's free expression. The Board argued that ". . . a teacher may have a far more pervasive influence over a student than would one student over another," and therefore the Board's broad power to control the curriculum should extend "to controlling a teacher's speech in public schools. . . ." *Id.*, at 573. Rejecting this claim, the *James* court said:

> The question we must ask in every first amendment case is whether the regulatory policy is drawn as narrowly as possible to achieve the social interests that justify it, or whether it exceeds permissible bounds by unduly restricting protected speech to an extent "greater than is essential to the furtherance of" those interests. *See United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968). Thus, when a teacher presents a colorable claim that school authorities have infringed on his first amendment rights and arbitrarily transgressed on these transcendent values, **school authorities must demonstrate a reasonable basis for concluding that the teacher's conduct threatens to impair their legitimate interests in regulating the school curriculum**.

Id., at 574 (emphasis added). The Second Circuit specifically relied on *Pickering* and held that balancing of the interests is required and that it is the school's burden to demonstrate a need to regulate the speech in order to carry out its mission. 461 F.2d at 571-72.

Similarly, the Fifth Circuit has made it clear that where (as here) a teacher is presenting approved curriculum, he or she retains a First Amendment right to foster lively classroom

discussion. In *Kirkland*, the court held that a supplemental reading list did not present a matter of public concern under the facts presented, and that *Pickering* balancing was therefore not necessary. *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 799-800 (5th Cir. 1989). This holding turned on the fact that Mr. Kirkland was not expressing any personal opinion – was not speaking "as a citizen" – when he proffered his reading list. *Id.*, at 800. But *Kirkland* does not stand for the proposition that in-class speech is never protected. In fact, the *Kirkland* court specifically noted that it is "well settled that even nontenured public school teachers do not shed first amendment protection in speaking on matters of public concern," *Id.*, at 798, and qualified its holding this way:

> Our decision should not be misconstrued as suggesting that a teacher's creativity is incompatible with the first amendment, **nor is it intended to suggest that public school teachers foster free debate in their classrooms only at their own risk** or that their classrooms must be "cast with a pall of orthodoxy." We hold only that public school teachers are not free, under the first amendment, to arrogate control of curricula.

Id., at 801 (emphasis added).[12]

The Sixth Circuit held in *Cockrel* that an elementary school teacher had a First Amendment right to invite a speaker to talk to her class about the benefits of industrial

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[12] The Fifth Circuit presumably would have found Mayer's speech to be protected, because she did not attempt to arrogate control over the curriculum, and because her speech merely fostered free debate in her classroom.

hemp, despite the evidence adduced by the school of a backlash from other teachers and school staff, and from many parents and members of the school community. *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036 (6th Cir. 2001). At about the same time, the Ninth Circuit assumed, without deciding, that a teacher's instructional speech would be protected by the First Amendment in certain circumstances, and said that the analysis in *Hazelwood* would apply. *California Teachers Association v. State Bd. Of Educ.*, 271 F.3d 1141, 1148-49 (9th Cir. 2001).

There is a split among the circuits regarding how to evaluate a teacher's First Amendment rights (if any) regarding instructional speech. The First, Second, Seventh, Eighth, and Tenth Circuits generally have followed the analysis in *Hazelwood* to teachers' in-class speech. *Ward*, 996 F.2d at 452; *Silano*, 42 F.3d at 719, 723; *Webster*, 917 F.2d at 1008; *Lacks*, 147 F.3d at 724; *Miles*, 944 F.2d at 775-779. On the other hand, the Third, Fourth, Fifth, Ninth, and D.C. Circuits generally have followed *Pickering*. *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3rd Cir. 1990); *Boring*, 136 F.3d at 368; *Kirkland*, 890 F.2d at 799-800; *Nicholson* 682 F.2d at 865. Now, the Seventh Circuit has followed the reasoning in *Garcetti* to a conclusion that effectively kills the First Amendment with respect to instructional speech and creates a bright-line rule that teachers have no constitutionally protected rights regarding instructional speech.

The magnitude of the circuit split on this issue is plain. Mayer's speech would have been protected if only she had taught in Ohio instead of Indiana. The Sixth Circuit likely would have reversed the district court under the facts presented here because that circuit has consistently applied the *Pickering* balancing test to cases of in-class speech by public school teachers, and has found that speech protected even

where there was public outcry over it. *Evans-Marshall v. Board of Ed. Of the Tipp City Exempted Village Sch. Dist.*, 428 F.3d 223 (6th Cir. 2005); *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036 (6th Cir. 2001). Unlike the Fourth Circuit, where the characterization of speech as "curricular" is sufficient to hold that it is not protected – *see, e.g., Lee v. York County School Div.*, ---F.3d ---, 2007 WL 1267038 at *8 (4th Cir. May 2, 2007) (finding that speech is "curricular in nature" means it "does not constitute speech on a matter of public concern) – the Sixth Circuit looks past the question of whether speech is curricular and balances the relative interests of teacher and school *Evans-Marshall*, 428 F.3d at 231. If, as in both *Evans-Marshall* and the present case, the school board had previously approved the controversial speech, then the Sixth Circuit would have held that the school's interest in regulating that same speech was undercut: "[w]e have previously concluded that the prior approval of controversial speech by the school or the Board undercuts the interests of the state in controlling the workplace." *Id.*, (citation omitted).

It is clear from its opinion in this case that the Seventh Circuit lines up with the Fourth Circuit in holding that public school teachers have no protected constitutional interest in classroom speech. App. 5a. The reasoning is somewhat different; the Seventh Circuit finds no constitutional protection because the "school system does not 'regulate' teachers' speech as much as it *hires* that speech." *Id.* (emphasis in original). The result is the same: teachers in the Fourth or Seventh Circuits can be fired for their speech even if they follow the curriculum. Meanwhile, the Sixth Circuit focuses on the fact that the Supreme Court "has never removed in-class speech from its presumptive place within the ambit of the First Amendment," and continues to perform the

difficult but important task of balancing the interests of teacher and school. *Evans-Marshall*, 428 F.3d at 229, 231.

Certiorari should be granted to address this stark and troubling conflict among the circuits and to give guidance on this supremely important issue to lower courts, teachers, administrators, school boards, students, and parents.

III. THE SEVENTH CIRCUIT'S APPLICATION OF *GARCETTI* TO SPEECH IN AN ELEMENTARY SCHOOL CLASSROOM UNDULY RESTRICTS A FUNDAMENTAL AMERICAN FREEDOM.

As noted above, the Seventh Circuit appears to have abandoned the usual course of analyzing teacher speech using either *Pickering* or *Hazelwood* and has articulated a bright-line rule. Following the reasoning in *Garcetti*, the court has concluded that since all teacher speech is for hire no First Amendment rights can attach to that speech. This Court should grant certiorari to explore the impact of its decision in *Garcetti* on the First Amendment rights of teachers with regard to instructional speech. This case provides a good vehicle for doing so, because it presents sharply a situation where a teacher is engaged in precisely what teachers are supposed to do, and where her speech may fairly be said to have been simultaneously citizen speech and employee speech.[13] Guidance on this subject is sorely needed by

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[13] Characterizing a teacher's speech as "employee speech" or "citizen speech" presents a false dichotomy. As Judge Motz noted when writing the majority panel opinion in *Boring*, "the essence of a teacher's role in the classroom, and therefore as an employee, is to discuss with students issues of public concern." *Boring v. Buncome County Bd. of Educ.*, 98 F.3d 1474, 1480 (4th Cir. 1996) (panel opinion). "When a teacher steps into the classroom she assumes a position of extraordinary public trust and

teachers, who are left to wonder whether they have any First Amendment protection left at all for their instructional speech.

A. The Seventh Circuit should not have invoked *Garcetti*.

The Seventh Circuit has effectively, if not explicitly, applied the rule from *Garcetti* to hold that the school board has the unrestricted right to punish instructional classroom speech regardless of whether that speech frustrates the school's educational mission in any way. App. 5a-6a. The Court of Appeals assumed that all speech by a teacher in class during instructional time is purchased by the school board, and that teachers retain no personal interest whatsoever in that speech. *Id.* Petitioner respectfully suggests that the Seventh Circuit has gone too far in characterizing the nature of a teacher's in-class instructional speech as bought and sold. This Court said in *Garcetti* that ". . . the First Amendment protects a public employee's right in certain circumstances to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1957, 164 L.Ed.2d 689 (2006). This Court also said "[m]any citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like 'any member of the general public' . . . to hold that all speech within the office is automatically exposed to restriction." *Id.*, at 1959. Yet, the Seventh Circuit's opinion does precisely what *Garcetti* said should not be done and holds that all

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confidence: she is charged with educating our youth. Her speech is neither ordinary employee workplace speech nor common public debate. Any attempt to force it into either of those categories ignores the essence of teaching – to educate, to enlighten, to inspire – and the importance of free speech to this most critical endeavor." 136 F.3d at 377 (dissenting opinion).

speech within the classroom is automatically exposed to restriction because such speech is a "commodity" teachers sell for a price -- thus eliminating the potential for any "certain circumstances" in which a teacher's speech may be protected. App. 5a-6a.

The facts of this case raise the following constitutional question: Does a teacher who is asked to give a personal opinion on a matter of great public concern by a student and during the instructional period, where opinions are the subject of the approved curriculum, have any measure of constitutional protection when she obliges the student and reveals her personal opinion? The Seventh Circuit answered this question in the negative, relying on cases upholding the school board's broad authority to set curriculum and its characterization of the teacher's speech as speech for hire. App. 5a-6a. This analysis was faulty because it failed to take into account the "additional constitutional interests" alluded to by this Court in *Garcetti*. 126 S.Ct. at 1962.

Mayer's speech was nothing like Mr. Ceballos' speech in his memo. Mayer's personal opinion was not what she was paid to present to the class *per se*. She was, of course, paid to present the curriculum. But the curriculum itself could not have been presented without showing the class differences of opinion on matters of public concern. Indeed, the *Time for Kids* article itself referenced differing opinions regarding the buildup to war in Iraq. Opinions were the curriculum here. The article the class chose to read and discuss dealt with peace protests related to the impending war in Iraq. Obviously, the school board chose to present this type of potentially controversial subject matter as part of the curriculum and could have easily anticipated that fourth grade students would be curious about their teacher's personal opinion on the subject. Allowing the school board to punish

the teacher for nurturing that curiosity will not only subvert the educational mission of the school, but the pall of orthodoxy such punishment tends to create will be likely to spread to other districts and frustrate the educational mission of the nation's public schools generally.

Without curiosity there can be no education; without differing opinions there can be no discourse. Once asked for their opinion, teachers must make a judgment call about whether to present it as requested (unless the school board has made it clear that they should not – something that had not happened in this case until after Mayer taught the lesson in question).[14] Teachers frequently are called upon to make such judgments instantly and without any formal guidance, and should have some measure of constitutional protection when they do unless it can be shown that their speech went too far or somehow interfered with the school's educational mission. If teachers can be fired for "every random comment" they make in class,[15] then the First Amendment is, to them at least, nothing more than platitudes on parchment.

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[14] The Seventh Circuit said "Mayer was told that she could teach the controversy about policy toward Iraq, drawing out arguments from all perspectives, as long as she kept her opinions to herself." App. 6a. This statement is highly misleading and, in the context of the opinion, blatantly false. Mayer was never told to keep her opinions to herself until after her class discussed the *Time for Kids* article. The lower court's opinion unfairly and incorrectly makes it appear that Mayer had been disobedient.

[15] "In the classroom there are recognized limits on local control of educational matters. School boards are for example not free to fire teachers for every random comment in the classroom." *Zykan v. Warsaw Comm. Sch. Corp.*, 631 F.2d 1300, 1305 (7th Cir. 1980) (citing *Sterzing v. Fort Bend Indep. Sch. Dist.*, 376 F.Supp. 657 (S.D.Tex. 1972)).

The Seventh Circuit erected a false dichotomy between the school's approved curriculum on the one hand, and Mayer's expression of opinion on the other. Differing opinions about the impending war in Iraq was the curriculum. The First Amendment limits, or should limit, the power of a school board to punish teachers when they are called upon to teach weighty, controversial subjects to children. This is especially true when, as here, the teacher is given no prior warning that she should conceal her personal opinion even if asked.

Mayer was asked to teach about differing opinions on the war. It should have been obvious that such curriculum would lead to a discussion of opinions in class, including the teacher's opinion. Rankling this or that parent was an entirely foreseeable consequence of the curricular choices made by the board, but our free society must tolerate such risk:

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of our independence and vigor of Americans who grow up and live in this relatively permissive, often disputations, society.
>
> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where

> there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained. *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966).

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508-09, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *see also Shelton v. Tucker*, 364 U.S. 479, 487, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools.").

Under the circumstances here it is particularly shocking that the school was allowed to punish Mayer for presenting an opinion on a controversial subject that she was required to teach. When public servants are asked to perform difficult and delicate tasks like this, they should be given some leeway with respect to how they carry out their duties. Police and fire officers are granted limited immunities because of the nature of the tasks they are asked to perform. Teachers should be granted similar protection because the tasks they are asked to perform are likewise difficult and delicate. Our teachers are the first responders in our children's journey to adult membership in a democracy. Ms. Mayer was able to present difficult curriculum about war and peace in a professional way that caused no disruption in her class and did no violence to the school's educational mission. No governmental interest (either as speaker or as employer) was served by granting the board unfettered power to punish her honest answer to a child's question.

B. Even if *Garcetti* provides the proper framework for consideration of this case, Mayer's speech should still be protected.

This Court made special note of the uniqueness of First Amendment claims arising out of the classroom context in its recent opinion in *Garcetti*. Although the Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.*, at 1960, it also specifically reserved judgment on whether its analysis in *Garcetti* would apply in cases such as this one because "[t]here is some argument that expression related to academic scholarship **or classroom instruction** implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence." *Id.*, at 1962 (emphasis added).

The "additional constitutional interests" this Court was concerned about in *Garcetti* were, at a minimum, the notions of "academic freedom" and "political expression."[16] For example, a teacher has (or should have) a First Amendment right to academic freedom in the teaching of approved curriculum to his or her class, and that right is infringed where, as here, the teacher is punished or suffers retaliation after parents complain about the teaching of that curriculum. *Stachura v. Memphis Comm. Sch. Dist.*, 763 F.2d 211, 215 (6th Cir. 1985), reversed on other grounds, *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 106 S.Ct. 2537, 91

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[16] When the majority acknowledged the "additional constitutional interests" that "are not fully accounted for" in *Garcetti*, it referred to Justice Souter's dissent. These are the interests Justice Souter was concerned about. 126 S.Ct. at 1962, 1969-1970.

L.Ed.2d 249 (1986). More important, however, is the interest of each and every citizen in self-government: "The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984). Therefore, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). This is why "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citation omitted). Simply put, granting absolute, unchecked authority to a local school principal to strictly forbid a teacher from even mentioning peace as an alternative to war, which is a public affair of the highest order, cannot be what this Court had in mind in *Garcetti*. This is especially true where, as here, the teacher's opinion on the subject was solicited by her class, and was a natural and predictable outgrowth of a lesson based on curriculum specifically approved by the school. The circumstances of this case implicate directly the additional constitutional interests about which this Court was concerned in *Garcetti*; therefore, the analysis in that case is inapposite.

Moreover, and perhaps even more importantly, it is clear the majority's opinion in *Garcetti* rested on the premise that "[r]estricting speech that **owes its existence** to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Garcetti*, 126 S.Ct. at 1959 (emphasis added). The issue in *Garcetti* was whether or not a memo written by Mr. Ceballos pursuant to his official job duties constituted protected speech. *Id.*, at 1959-1960. That memo never

would have been written had he not been functioning in his official capacity; there would never have been any reason for Mr. Ceballos even to form the opinions he expressed in the memo had he not been a deputy district attorney. By contrast, Mayer's opinions about peace were personal to her; they formed not because of any on-the-job investigation she was required to do but because she paid attention to current events and had a son in the military whom she would rather have kept out of harm's way. Her speech did not owe its existence to her job any more than Mr. James' armband owed its existence to his. It was her view as a private citizen expressed to her students only because it became relevant during an officially sanctioned in-class discussion of current events. Unlike the situation in *Garcetti*, the speech here was not speech which "the employer itself has commissioned or created" and therefore had the right to control. *Id.*, at 1960. To find, as the lower courts did, that Mayer spoke as an employee and not as a citizen is to pretend that teachers are not also citizens. That proposition has been resoundingly rejected, *Tinker*, 393 U.S. at 506 and 509; *James*, 461 F.2d at 574, and should not be used as a basis to deny Mayer her day in court. As Justice Kennedy noted in *Garcetti*, "it would not serve the goal of treating public employees like 'any member of the general public,' *Pickering*, 391 U.S. at 573, 88 S.Ct. 1731, to hold that all speech within the office is automatically exposed to restriction." *Garcetti*, 126 S.Ct. at 1959. Yet that is exactly what the Seventh Circuit held here: that all speech within Mayer's "office" – the classroom – is by definition beyond the reach of the First Amendment. That holding should not be allowed to stand, because if it is, teachers will no longer be willing or able to teach difficult curriculum out of fear of losing their jobs when this or that parent decides to accuse them of exposing their child to an unpopular viewpoint.

The Seventh Circuit's refusal to recognize First Amendment protection for the reasonable, professional expression of a personal opinion on a matter of the utmost public concern – in other words, the court's bright line approach to in-class speech by teachers – is contrary to this Court's reasoning in a multitude of First Amendment decisions including *Tinker, Pickering,* and *Connick*. It will result in an inability or unwillingness (or both) of teachers to engage students in any meaningful way in the precious and unique academic environment. Further, the decision fails to take into account the special qualities of the classroom and treats teacher speech no differently than the employee speech at issue in *Garcetti*. Certiorari should be granted to correct the error in this case, and to use the case as a vehicle for guidance to public school teachers, board members, and administrators.

IV. CERTIORARI SHOULD BE GRANTED TO CORRECT THE LOWER COURT'S MISPERCEPTION OF A CRITICAL FACT.

This Court should issue a writ of certiorari in order to correct the Seventh Circuit's failure to decide the issue actually presented to it by this case. The opinion below rested at least in part on an incorrect assessment of the facts, meaning that the court actually decided the wrong question. As noted above, Mayer was never told, in advance of her "Honk for Peace" comment, that she was forbidden from disclosing her personal opinion, let alone while discussing approved curriculum with her class and in response to a legitimate, altogether appropriate question from one of her students. To the extent the Seventh Circuit's opinion rests on its incorrect assumption that Mayer was disobeying or disregarding the school corporation's curriculum choices, the opinion is fatally flawed and should be reversed.

The Seventh Circuit said:

> Mayer was told that she could teach the controversy about policy toward Iraq, drawing out arguments from all perspectives, as long as she kept her opinions to herself. The Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials.

App. 6a-7a (emphasis added). The problem with the opinion – the fundamental flaw revealed by the preceding passage – is that it assumes Mayer was disobedient and that she gave her opinion (contained in her answer to her student's question about peace marches) "against the instructions" of elected officials. The court got the chronology wrong, and therefore reached the wrong result.

It is undisputed that Mayer never said anything against the instructions or policies of the school defendants. It also is undisputed that the school had no policy in place regarding presentation of personal opinions by teachers until after Mayer answered the peace question in her classroom. The Seventh Circuit mistakenly believed that Mayer claimed the right to make curriculum choices and that she disregarded the curriculum choices made by the school defendants. This mistaken belief is evident in the court's reliance on *Webster v. New Lenox School District No. 122*, 917 F.2d 1004 (7th Cir. 1990). In *Webster*, the issue was whether a teacher "has a first amendment right to determine the curriculum content" of his or her class. *Id.*, at 1007 (emphasis added). That is not the issue here. Mayer does not claim the right to control curriculum, and Mayer did not arrogate control of the curriculum in her class. In this case, Mayer was punished and then terminated because of a single comment she made about peace in response to a student's question. The facts of

Webster simply cannot be compared to the facts here and, consequently, *Webster* cannot provide a basis for the Seventh Circuit's decision.

The lower court assumed that Mayer had been instructed *before* her peace comment to "draw out arguments from all perspectives" and to keep her opinions to herself. Based on this incorrect assumption about the facts, the court went on to hold that "the first amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system." App. 7a-8a (emphasis added). Again, Mayer never departed from any approved curriculum. She was never told to keep her opinions to herself until after the fact, and she fully complied with that directive. Certiorari should be granted to correct the injustice caused by the lower court's misperception of the facts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael L. Schultz
Counsel of Record
PARR RICHEY OBREMSKEY & MORTON
225 West Main Street
Lebanon, Indiana 46052
(765) 482-0110

Counsel for Petitioner

June 8, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 06-1993

[Filed March 12, 2007]

DEBORAH A. MAYER,
Plaintiff-Appellant,

v.

MONROE COUNTY COMMUNITY SCHOOL CORPORATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.

No. 1:04-CV-1695-SEB-VSS.
Sarah Evans Barker, Judge.

Before Hon. FRANK H. EASTERBROOK, Chief Judge,
Hon. KENNETH F. RIPPLE, Circuit Judge,
Hon. DANIEL A. MANION, Circuit Judge.

ORDER

Plaintiff-appellant filed an amended petition for rehearing and rehearing en banc on February 13, 2007. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 06-1993

[Filed January 24, 2007]

DEBORAH A. MAYER,
Plaintiff-Appellant,

v.

MONROE COUNTY COMMUNITY SCHOOL CORPORATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.

No. 1:04-CV-1695-SEB-VSS
Sarah Evans Barker, Judge.

Before EASTERBROOK, *Chief Judge*, and RIPPLE and MANION, *Circuit Judges*.

EASTERBROOK, *Chief Judge*. Deborah Mayer worked for one year as a probationary elementary-school teacher in

Monroe County, Indiana. When the school district did not renew her contract for a second year, Mayer filed this suit under 42 U.S.C. § 1983, maintaining that the school system let her go because she took a political stance during a current-events session in her class, thus violating the first amendment. The district court granted summary judgment to the defendants, so we must accept Mayer's version of events—which is that she answered a pupil's question about whether she participated in political demonstrations by saying that, when she passed a demonstration against this nation's military operations in Iraq and saw a placard saying "Honk for Peace", she honked her car's horn to show support for the demonstrators. Some parents complained, and the school's principal told all teachers not to take sides in any political controversy. Mayer believes that this incident led the school system to dismiss her; we must assume that this is so.

The district court concluded that, because military intervention in Iraq is an issue of public importance, Mayer had a right to express her views on the subject, but that the right is qualified in the workplace by the requirement that expression not disrupt an employer's business unduly. This is the method of *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). After concluding that the employer's interests predominate, the district court gave judgment for the defendants. Mayer contends on appeal that the balance under *Pickering* weighs in her favor. For their part, defendants contend that interest balancing plays no role when the speech in question is part of the employee's official duties. *See Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960, 164 L. Ed. 2d 689 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."); *Mills v.*

Evansville, 452 F.3d 646 (7th Cir. 2006). Mayer concedes that the current-events session, conducted during class hours, was part of her official duties; if *Garcetti* supplies the rule of decision, then the school district prevails without further ado. Mayer insists, however, that principles of academic freedom supersede *Garcetti* in classrooms, and she relies on a statement in *Piggee v. Carl Sandburg College*, 464 F.3d 667, 672 (7th Cir. 2006), that *Garcetti* was "not directly relevant" to the college instructor's speech in that case.

Whether teachers in primary and secondary schools have a constitutional right to determine what they say in class is not a novel question in this circuit. We held in *Webster v. New Lenox School District No. 122*, 917 F.2d 1004 (7th Cir. 1990), that public-school teachers must hew to the approach prescribed by principals (and others higher up in the chain of authority). Ray Webster wanted to teach his social-studies class that the world is much younger than the four-billion-year age given in the textbook the class was using; he proposed that the pupils consider the possibility of divine creation as an alternative to the scientific understanding. We held that Webster did not have a constitutional right to introduce his own views on the subject but must stick to the prescribed curriculum--not only the prescribed subject matter, but also the prescribed perspective on that subject matter. Following *Palmer v. Board of Education*, 603 F.2d 1271 (7th Cir. 1979), we held in *Webster* that "those authorities charged by state law with curriculum development [may] require the obedience of subordinate employees, including the classroom teacher." 917 F.2d at 1007. *See also Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1998).

This is so in part because the school system does not "regulate" teachers' speech as much as it *hires* that speech. Expression is a teacher's stock in trade, the commodity she

sells to her employer in exchange for a salary. A teacher hired to lead a social-studies class can't use it as a platform for a revisionist perspective that Benedict Arnold wasn't really a traitor, when the approved program calls him one; a high-school teacher hired to explicate *Moby-Dick* in a literature class can't use *Cry, The Beloved Country* instead, even if Paton's book better suits the instructor's style and point of view; a math teacher can't decide that calculus is more important than trigonometry and decide to let Hipparchus and Ptolemy slide in favor of Newton and Leibniz.

Beyond the fact that teachers hire out their own speech and must provide the service for which employers are willing to pay—which makes this an easier case for the employer than *Garcetti*, where speech was not what the employee was being paid to create—is the fact that the pupils are a captive audience. Education is compulsory, and children must attend public schools unless their parents are willing to incur the cost of private education or the considerable time commitment of home schooling. Children who attend school because they must ought not be subject to teachers' idiosyncratic perspectives. Majority rule about what subjects and viewpoints will be expressed in the classroom has the potential to turn into indoctrination; elected school boards are tempted to support majority positions about religious or patriotic subjects especially. But if indoctrination is likely, the power should be reposed in someone the people can vote out of office, rather than tenured teachers. At least the board's views can be debated openly, and the people may choose to elect persons committed to neutrality on contentious issues. That is the path Monroe County has chosen; Mayer was told that she could teach the controversy about policy toward Iraq, drawing out arguments from all perspectives, as long as she kept her opinions to herself. The Constitution does not entitle

teachers to present personal views to captive audiences against the instructions of elected officials. To the extent that *James v. Board of Education*, 461 F.2d 566 (2d Cir. 1972), and *Cockrel v. Shelby County School District*, 270 F.3d 1036, 1052 (6th Cir. 2001), are to the contrary, they are inconsistent with later authority and unpersuasive.

Piggee supports the school district rather than Mayer. An instructor at a community college, Piggee had argued that the first amendment allowed her to promote a religious perspective on homosexuality to students in a cosmetology class. We held, to the contrary, that a college may demand that instructors limit their speech to topics germane to the educational mission. A germaneness rule does not entail balancing under *Pickering*; Piggee could not conduct "just a little" proselytizing on the theory that it did not do "very much" harm to the educational mission. Our remark that *Garcetti* was "not directly relevant" did not reflect doubt about the rule that employers are entitled to control speech from an instructor to a student on college grounds during working hours; it reflected, rather, the fact that Piggee had *not* been hired to buttonhole cosmetology students in the corridors and hand out tracts proclaiming that homosexuality is a mortal sin. The speech to which the student (and the college) objected was not part of Piggee's teaching duties. By contrast, Mayer's current-events lesson was part of her assigned tasks in the classroom; *Garcetti* applies directly. How much room is left for constitutional protection of scholarly viewpoints in post-secondary education was left open in *Garcetti* and *Piggee* and need not be resolved today. Nor need we consider what rules apply to publications (scholarly or otherwise) by primary and secondary school teachers or the statements they make outside of class. *See Vukadinovich v. North Newton School Corp.*, 278 F.3d 693 (7th Cir. 2002). It is enough to hold that the first amendment

does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system.

AFFIRMED

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA,
INDIANAPOLIS DIVISION

1:04-CV-1695-SEB-VSS

[Filed March 10, 2006]

DEBORAH A. MAYER,	)
Plaintiff,	)
	)
vs.	)
	)
MONROE COUNTY COMMUNITY	)
SCHOOL CORPORATION, et al.,	)
Defendants.	)
	)

ENTRY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Deborah A. Mayer ("Mayer") filed her Complaint in this action on October 5, 2004 in the Monroe County Circuit Court and, on October 18, 2004, the case was removed to this court by Monroe County Community School Corporation ("MCCSC" or "School") and its Superintendent John Maloy, individually and in his representative and official capacity as School Superintendent; Cheryl Brown, individually and in her capacity as President of the School

Board; Victoria Rogers, individually and in her capacity as Principal of Clear Creek Elementary School; and Pam Sklar, individually and in her capacity as Director of Human Resources for the School Corporation (collectively the "Defendants"), pursuant to 28 U.S.C. § 1441 and § 1446. Now before the Court is Defendants' Motion for Summary Judgment on each of the four counts in the Complaint.

We summarize the four counts in Ms. Mayer's Complaint as follows: Ms. Mayer alleges that the School Defendants: (1) violated her rights under the First Amendment after she spoke out against the Iraq war (Count I); (2) conspired together to violate her civil rights in violation of 42 U.S.C. § 1985 (Count II); (3) breached her employment contract (Count III); and (4) failed to follow the legal requirements imposed by the Indiana's Teacher Tenure Act prior to the non-renewal of her contract (Count IV). (Def.s' Reply in Supp. at 1.)

Defendants maintain that Count I of the Complaint must be dismissed because Ms. Mayer's comments regarding Iraq were not protected speech under the First Amendment. Count II must be dismissed because § 1985(3) does not apply where there is an "intra-corporate" conspiracy. Count III warrants dismissal based on a lack of evidence to establish that Plaintiff's contract was improperly terminated, in fact, to the contrary, the evidence shows that her termination was based on her inability to work with students and parents. Regarding Count IV, Defendants assert that they have met all the requirements imposed on them by state law under the Indiana Teacher Tenure Act.

Plaintiff's Motion to Strike Defendants' "Statement of Material Facts"

As a preliminary matter, we address Plaintiff's motion to strike a substantial portion of Defendants' submissions in support of the pending motion. In "Plaintiff's Response to Defendants' Motion for Summary Judgment" [hereinafter Pl.'s Resp.], Plaintiff objects to and moves to strike, the portion of Defendants' Brief labeled "Statement of Material Facts" claiming that it fails to "include a section labeled Statement of Material Facts Not in Dispute' containing the facts potentially determinative of the motion as to which the moving party contends there is no genuine issue" as required by Local Rule 56.1 (a). Pl.'s Resp. at 4.

In response, Defendants state that, by inadvertence, they omitted three words, "not in dispute," from the heading of their moving brief but that this small error in no way prejudiced Ms. Mayor, nor was it done in bad faith. (Def.s' Reply in Supp. at 10, *citing Bell v. Bowman, Heintz, Boscia & Vician, P.C.*, 370 F. Supp. 2d 805, 806 n. 1 (S.D. Ind. 2005) (denying plaintiff's motion to strike as violation of L.R. 56.1 did not prejudice plaintiff); *see also Luttrull v. McDonald's Corp.*, 2004 U.S. Dist. LEXIS 24341, No. 3:04-CV-00117-JDT-WG, 2004 WL 2750244 at *6 n.6 (S.D. Ind. Nov. 2, 2004) (finding that a violation of L.R. 5.2(a)(3) was not willful or in bad faith and therefore denied plaintiffs' motion for sanction and to strike)).

Because there is no evidence to show that Defendant's failure to conform completely to the requirements of L.R. 56.1 caused any real prejudice to Plaintiff, nor that the omission of these words was done in bad faith, the Court DENIES Plaintiff's motion to strike the section in Defendants' brief labeled "Statement of Material Facts." *See* L.R. 56.1(i)

(stating that "the Court may, in the interests of justice or for good cause, excuse the failure to comply strictly with the terms of this rule.")

Factual Background

On August 12, 2002, Ms. Mayer applied for a substitute teaching position at Clear Creek Elementary School ("Clear Creek" or "the School") in Bloomington, Indiana. (Mayer Dep. Exh. 1). When the LAUnCHED[1] classroom teacher, Steve Cole, quit his position at Clear Creek two weeks into the school year, the School moved Ms. Mayer from her substitute position into the full-time position to teach the LAUnCHED class. (Rogers Depo., p. 27-28). Ms. Mayer had a one-year contract with Defendant MCCSC and was a non-tenured probationary teacher for the 2002-2003 school year, and her contract was not renewed as of April 24, 2003.

Classroom Discussion of Peace and the War in Iraq

Ms. Mayer used the "Time for Kids" ("TFK") newsletter nearly every Friday to teach her students about current events. (Complaint, ¶¶ 19-20; Mayer Dep. p. 60). The TFK newsletter was a part of the approved curriculum at Clear Creek and the LAUnCHED classroom. (Mayer Dep. p. 57-58, 60). On January 10, 2003, Plaintiff taught a class, using the TFK December 13, 2002 issue, which discussed peace marches in Washington, D.C. conducted in protest of U.S. involvement in the war in Iraq. (Complaint, ¶ 20; Pl.'s Resp.

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[1] The LAUnCHED classroom is designed to provide an alternative learning experience in a multi-age setting for students of all abilities in grades 4-6.

at 1). In her deposition testimony, Ms. Mayer described her discussion of the article as follows:

> After we had talked about some of the other things that had happened, one of the kids asked me —and we had read the article about the peace march in Washington, D.C., one of the kids asked me if I would ever march in a peace march. At that time I said, "Peace marches are going on all over the country. We even have demonstrations here in Bloomington, Indiana. When I drive past the courthouse square and the demonstrators are picketing I honk my horn for peace because their signs say, 'Honk for Peace.'
>
> And then I went on to say that I thought that it was important for people to seek out peaceful solutions to problems before going to war and that we train kids to be mediators on the playground so that they can seek out peaceful solutions to their own problems and so they won't fight and hurt each other. And that was the extent of the conversation and the discussion.
>
> And it lasted probably no more than five minutes.

(Mayer Dep., p. 62). Ms. Mayer characterized her discussion in a similar manner in her Complaint, stating, in part:

> During the discussion, one student asked Plaintiff if she would ever march in a peace march. Although she did not usually give her opinion in class, in this case she explained that peace marches were taking place all over the country, including in Bloomington...She stated that she thought peace was an option to war and

> that peaceful solutions should be sought before going to war.

(Complaint, ¶ 20).

School's Response to Ms. Mayer Imparting her Opinions on Peace to the Class

Mr. and Ms. Hahn had a daughter in Ms. Mayer's classroom, and, on January 13, 2003, a meeting was held at their request with Ms. Mayer and Principal Rogers to complain about Ms. Mayer's discussion of the Iraq war in the LAUnCHED classroom. (Hahn Aff. ¶¶ 6-8). Plaintiff claims that at this meeting Principal Rogers unilaterally prohibited Ms. Mayer from discussing peace in her classroom, when she responded to an angry Mr. Hahn who was seeking some restraint by Ms. Mayer on the subject, saying "I think she can do that. I think she can not mention peace in her class again." (Pl.'s Reply at 30; Mayer Dep., pp. 74-76). Plaintiff asserts that this action by the Principal chilled her from speaking about the war in Iraq or peace because she feared losing her job if she again addressed the issue in class. (Pl.'s Reply at 30; Mayer Dep., p. 76).

Following the meeting with the Hahns, Principal Rogers circulated a written memo entitled "Peace at Clear Creek." (Pl.'s Reply at 30-31). The memo, identified as being "From the Principal," said, in relevant part:

> We are living in scary times with the treat [sic] of war and a high level of concern for everyone's personal safety. For many years at Clear Creek, we have had an annual Peace Month in January and support the peaceful solution of problems through mediation. This

> continues to be a focus for the way we solve problems here. Learning requires a peaceful environment.
>
> We absolutely do not, as a school, promote any particular view on foreign policy related to the situation with Iraq. That is not our business. Individuals in a democracy have personal beliefs, but a public school acknowledges various points of view and those might be discussed related [to] current events and the news.
>
> Do we talk about peace at school? Yes, as a general approach to solving problems at Clear Creek. Please do not confuse that educationally sound goal with a stance on foreign policy.

(*Id.*) At the meeting where Principal Rogers handed out the "Peace at Clear Creek" memo, she told the teachers that Peace Month was being cancelled. (Mayer Dep., p. 88). Plaintiff was asked at her deposition: "What was your understanding when you left the faculty meeting as to whether or not you could discuss peace in the classroom?" Ms. Mayer answered, "I thought it was pretty clear that we couldn't discuss peace in the classroom, but I thought that it was specifically in regard to the war with Iraq because in the peace memo it talks about the situation in Iraq." (Pl.'s Reply at 32; quoting Mayer Dep., pp. 89).

Parental Complaints Regarding Ms. Mayer's Teaching Techniques

The Defendants' briefings in support of summary judgment contain extensive facts of alleged parental complaints. These alleged factual assertions, though supported

by depositions and affidavits, are disputed by Ms. Mayer.[2] (Pl.'s Resp. at 4). Ms. Mayer states in her affidavit that "moving of students was not something unique to my classroom." (Mayer Aff. ¶ 7). Despite there being numerous parent complaints, it appears that only one—from the Hahns—complained of Ms. Mayer's discussion of the Iraq war and peace protests.

The Hahns

As mentioned previously, Mr. and Ms. Hahn's daughter was in Ms. Mayer's classroom, and on January 13, 2003, a meeting was held at their request between themselves, Ms. Mayer and Principal Rogers to complain about Ms. Mayer's discussion of the Iraq war during the LAUnCHED classroom session. (Hahn Aff., ¶¶ 6-8). The Hahns claim they were also concerned about Ms. Mayer's general classroom management and their daughter's educational progress, stating that their 6th grade daughter was being given 5th grade math problems. (*Id.* ¶¶ 4, 6, 7; Exh. "A" of Hahn Aff.). According to the Hahns, Ms. Mayer indicated to them that she would not change her teaching style only to accommodate their daughter and made comments that their daughter was lying about her teaching style and classroom management. (*Id.*) According to Principal Rogers, Ms. Mayer's conduct bordered on being unprofessional during the meeting with the Hahns. (Rogers

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[2] "Because of the volume of evidence and complexity of issues in this case, it is not practical for Plaintiff to respond in this brief to each and every allegation made by the parents in their affidavits and included in the 'Statement of Material Facts' section of Defendants' brief. Plaintiff does, however, dispute nearly all of the statements made by the parents in their affidavits, as is shown very clearly in Plaintiff's Affidavit. (*See* Plaintiff's Attachment F, Affidavit of Deborah Mayer)." Pl.'s Resp. at 4.

Dep., p. 199). Ms. Mayer claims that at the meeting, they did not discuss teaching style or classroom management; they discussed only Ms. Mayer's comment about peace demonstrations. (Mayer Aff. at ¶¶ 7, 8).

Following the meeting, Ms. Hahn again complained to Principal Rogers charging that Ms. Mayer continued to discuss her opinions on the war despite being instructed on January 13, 2003, to refrain from doing so. (Hahn Aff., ¶ 9). On February 5, 2003, Ms. Hahn e-mailed Principal Rogers, noting that:

> "it seems Ms. Mayer is still lecturing the class to protest the war. I have instructed [my daughter] that the next time this occurs I want her to report to the office and ask to call home to be picked up. I have full confidence that you will support this action."

(Rogers Dep., p. 87). Principal Rogers forwarded the e-mail to Ms. Mayer on February 6, 2003. (*Id.*) Thereafter, the Hahns came to view that Ms. Mayer retaliated against their daughter for their having met with Ms. Mayer on January 13, 2003, reporting that at one point Ms. Mayer laughed in their daughter's face as she told her she could not speak to Principal Rogers. (Hahn Aff., ¶ 10). Ms. Mayer states that she did not treat the Hahn's daughter poorly, she did not laugh in her face, nor did she discuss peace after January 13, 2003. (Mayer, Aff. ¶¶ 9, 10).

The Hahns requested that their daughter be placed in another classroom, but the school was unable to accommodate their request. ((Def.s' Reply in Supp. at 12-13; citing Hahn Aff.,¶ 12) Therefore, the Hahns transferred their daughter to a private school in March of 2003. (*Id.* at ¶ 13). Ms. Mayer

states in her affidavit that "moving of students was not something unique to my classroom." (Mayer Aff. ¶ 7).

The Quallses

Andy and Barbara Qualls ("the Quallses") expressed similar concerns regarding Ms. Mayer's instruction of their daughter to both Principal Rogers and Ms. Mayer during the first and second semesters of the 2002-2003 school year. (Rogers Dep., p. 28-29). The Quallses first complained to Ms. Mayer during the October 2002 parent-teacher conference that their fifth grader was being assigned fourth grade math problems. (Quails Aff., ¶ 5; Rogers Dep., p. 76). The Quallses also complained that Ms. Mayer displayed a negative attitude toward them when she said to them that she knew what she was doing despite their concerns.[3] (Qualls Aff., ¶ 6). They also believed that Ms. Mayer retaliated

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[3] The Quallses had additional complaints, although it is unclear if or when these issues were communicated to Ms. Mayer and or Principal Rogers. For example, they assert that: (1) Ms. Mayer would not permit their daughter to help out in the classroom; (2) Ms. Mayer would accuse the students of not turning in work; (3) students were not allowed to progress at their own pace and were treated like kindergartners; (4) Ms. Mayer would yell "shut up" in the classroom; (5) Ms. Mayer implied that the Quallses' daughter forged her mother's initials on a worksheet; and (6) Ms. Mayer refused to let the Quallses' daughter return to the gymnasium to retrieve her eyeglasses. (Qualls Aff'd. at ¶¶ 7-10, 13, 14). Ms. Mayer's actions caused the Quallses' daughter to frequently cry because she hated going to school. (*Id.* at ¶ 11; Rogers Depo., p. 198). Ms. Mayer denies or explains these comments with responses such as "If you were to ask any student in my classroom, 'Who laughs most in this class?' they would unanimously answer, "C.Q.." ...She was not unhappy at school. Her mother did not tell me she cried at home." (Mayer Aff. ¶ 11).

against their daughter after they expressed their concerns. (*Id.* at ¶ 12). On February 28, 2003, the Quallses wrote a five-page letter to Principal Rogers expressing their concerns regarding Ms. Mayer's actions and teaching methods. (Qualls Aff., 15; attached to Qualls Aff. as Exh. A). The Quallses' daughter was moved to Mr. Mont's classroom for the fourth nine-week period. (Def. Memo in Supp. at 12; Qualls Aff., ¶ 17).

Ms. Mayer states that she did not know of the Quallses' detailed letter nor any of the concerns voiced in it, learning of it only during discovery for this lawsuit. (Mayer Aff. ¶ 15). Ms. Mayer believe that the problems with the Qualls started when another student was removed from her classroom, and their daughter wanted to be moved into the same class with her friend. (Mayer Aff. ¶ 16).

The Millers

Tamby Miller ("Ms. Miller"), who also had a daughter in the LAUnCHED class, complained that Ms. Mayer made demeaning comments to her daughter and other classmates that made her daughter unable to focus on her homework after school. (Miller Aff., ¶ 4). Ms. Miller believes that Ms. Mayer told her students that she once taught Kindergarten and her Kindergarteners were smarter than the students she now taught in the LAUnCHED program. (Miller Aff., ¶ 5). According to Ms. Miller, her daughter suffered from anxiety and low self-esteem while she was a student in Ms. Mayer's classroom, due to Ms. Mayer's negativity and poor classroom management. (Miller Aff., ¶ 7).

Ms. Mayer states that she did not make derogatory comments about students and did not tell her students that her kindergartners were smarter than they were. Ms. Mayer

claims that other teachers and Ms. Miller told her that Ms. Miller's daughter was better adjusted in Ms. Mayer's class than in previous classes. (Ms. Mayer Aff., ¶¶ 4, 5, 6).

Ms. Miller stated that she expressed her concerns on several occasions to Ms. Mayer and Principal Rogers in October of 2002. (Miller Aff., ¶ 8). Moreover, according to Ms. Miller, Ms. Mayer laughed at her during one of the meetings when Ms. Miller was discussing Ms. Mayer's negative comments. (*Id.* at ¶ 9). Principal Rogers told Ms. Mayer in front of Ms. Miller that it was not a laughing matter. Ms. Mayer claims that she did not laugh in Ms. Miller' face although she smiled when she was asked to not give her class reading and writing homework on Mondays, Tuesdays, or Wednesdays because the Millers' daughter had to travel to gymnastics on those days and couldn't read in the car. (Mayer Aff. at ¶ 9).

Ms. Miller spoke with Principal Rogers and Ms. Mayer again following the 2002 Thanksgiving break because Ms. Mayer had not accommodated her concerns and because she wanted her daughter transferred to another LAUnCHED classroom. (Miller Aff., ¶ 12). Ms. Miller's daughter was transferred in February 2003 to Ms. Sterner's classroom. (Def. Memo in Supp. at 12; Miller Aff., ¶ 14). Ms. Mayer states that the Miller daughter was placed with Ms. Sterner because she was a former gymnast, and the Miller daughter was not required to do reading homework on those days in Ms. Sterner's classroom. (Mayer Aff., ¶ 9).

The Mullises

Lisa and Troy Mullis's ("the Mullises") daughter was in the 5th grade and assigned to Ms. Mayer's class. During the October 2002 parent-teacher conference, Ms. Mullis states

that she expressed concern that her daughter's grades were slipping to which Ms. Mayer responded that her daughter was a "needy" student. (Mullis Aff. at ¶ 5). Ms. Mayer states that Ms. Mullis expressed no concern that her daughter's grades were slipping and denies expressing to Ms. Mullis that her daughter was a "needy" student. Following the parent-teacher conference, Mr. Mullis attempted to speak again with Ms. Mayer about his daughter's grades and found Ms. Mayer to be very hostile and degrading during their conversation. (Mullis Aff. at ¶ 6). Ms. Mayer denies that Mr. Mullis attempted to speak with her after the Parent Conference, but alleges that he verbally assaulted her outside the principal's office her first week of school for not allowing his daughter to each chips in class and requiring his daughter to take a pass to the restroom. (Mayer Aff. ¶ 6).

The Mullises saw Ms. Mayer as exhibiting a "my way or the highway" approach in response to their concerns. (Mullis Aff. at ¶ 6). The Mullises spoke with Principal Rogers on approximately five occasions during the school year to complain about Ms. Mayer's teaching style and classroom management. (Mullis Aff. at ¶ 7). Ms. Mayer claims that she was not aware that the Mullises spoke with Principal Rogers five times, and that the Mullises did not attempt to contact her nor did they mention their concerns to her. (Mayer Aff. at ¶¶ 7 and 10). The Mullises believed that Mayer retaliated against their daughter after they had complained about Ms. Mayer. (Mullis Aff. at ¶ 8). Ms. Mayer denies this claim stating that she did not know that the Mullises had even spoken with Principal Rogers. (Mayer Aff. at ¶ 8). At their request, Principal Rogers removed their daughter from Ms. Mayer's class and placed her in another classroom. (Mullis Aff. ¶¶ 14, 17). Ms. Mayer states that she was not involved in the decision to remove the Mullises' daughter from her

class, nor was she given a reason for the move. (Mayer Aff., ¶ 13).

The Burgesses

Sherry Burgess ("Ms. Burgess") also reported problems with Ms. Mayer regarding her daughter's Individualized Education Plan ("IEP"). (Burgess Aff., ¶ 5). Ms. Burgess met with Ms. Mayer and Principal Rogers in October of 2002 to discuss the IEP. (Burgess Aff., ¶ 4). Ms. Burgess complained that Ms. Mayer consistently failed to follow the IEP and told Ms. Burgess that she did not have time to implement the plan. (*Id.* at ¶ 5). Among other complaints, Ms. Burgess contends that Ms. Mayer treated her daughter unfairly. (*Id.* at ¶¶ 6-7). Ms. Burgess met with Ms. Mayer, Principal Rogers, and the Inclusion Teacher in early 2003 to again complain that Ms. Mayer was not following her daughter's IEP. (*Id.* at ¶¶ 8-9).

Ms. Mayer states that if Ms. Burgess's daughter had an IEP (prior to May 2003), it was never given to her, although she did follow her behavioral contract diligently. (Mayer Aff., ¶¶ 4, 5). Ms. Mayer states that the only meeting she had with Ms. Burgess present was a required end-of-year case conference to discuss her daughters progress along with twelve other people.

The Foshas

Sherilyn and Joel Fosha were also vocal in their criticisms of Ms. Mayer and the relationship between the Foshas and Ms. Mayer deteriorated seriously during the second semester. (Fosha Aff., ¶¶ 5-12). The Foshas' daughter, who did not have problems with her grades prior to entering Ms. Mayer's classroom, was receiving failing grades in Ms. Mayer's class.

(*Id.* at ¶¶ 5-6; *see also* Rogers Dep. p. 119). The Foshas conveyed their concerns to Ms. Mayer and stressed that they were interested in cooperating with her to improve their daughter's performance, but Ms. Mayer displayed a negative attitude and made no effort to accommodate the Foshas' concerns. (Fosha Aff., ¶¶ 7, 11) As with the other parents, the Foshas found that Ms. Mayer's attitude was a "my way or the highway" approach, that she unfairly targeted students whom she deemed difficult and that she had poor classroom management skills. (*Id.* at ¶¶ 8-10). The Foshas' daughter was eventually transferred to Ms. Campbell's classroom. (Def.s' Memo in Supp. at 12; citing Fosha Aff., ¶ 13).

Ms. Mayer acknowledges that the Foshas complained that their daughter did not approve of a certain hand gesture that Ms. Mayer made to tell students to wait. However, she claims that she worked diligently and patiently with the Foshas allowing them to call her often and at home. (Mayer Aff. ¶¶ 9, 10). Ms. Mayer claims that the Foshas' daughter was pulled from her class because of the prospect of a potential lawsuit if she remained in her class with another student, who implicated each other in a sexual harassment incident. (Mayer Aff. ¶ 12).

The Perrys

Another set of parents, the Perrys, also insisted that their daughter be removed from Ms. Mayer's classroom, based on the allegations laid out by them in their Harassment Complaint against Ms. Mayer. (Roger Dep., p. 52; Defendants' Responses to Plaintiff's First Request for Production of Documents, Notes from Meeting with Mayer re: Harassment Complaint [at Docket No. 29]). In response to that Complaint, the Vice Principal, Tammy Miller, told Ms. Perry that her daughter could not be moved to another

classroom at that point because there were only three days of school remaining. (*Id.*)

Ms. Mayer's Formal Evaluations and Feedback

On February 7, 2003, Principal Rogers sent Ms. Mayer a "formal letter of concern regarding the apparent lack of success that [Ms. Mayer demonstrated] in creating a positive learning environment in [her] LAUnCHED classroom." (Def.s' Memo. in Supp. at 8; citing Exh. 13). In the letter, Principal Rogers stated that she was "moving select students from [her] class to defuse the present volatile situation." (*Id.*) She also placed Ms. Mayer on an improvement plan and directed her to work with Michelle Henderson to implement a positive learning environment, to attend weekly improvement meetings, and to improve her "interpersonal skills" and "refrain from presenting [her] political views" in the classroom. (*Id.*)

Less than a month after Principal Rogers's formal letter of concern was issued to Ms. Mayer, on March 10, 2003, the Hahns filed a complaint against Ms. Mayer under the School's Harassment policy, (Def.s' Memo in Supp. at 9, citing Hahn Aff., ¶ 11, attached to Hahn Aff. as Exh. A), alleging that "Ms. Mayer has harassed and intimidated Elise Hahn in a progressively worse fashion since [the January 13, 2003] meeting" and that "Ms. Mayer has ridiculed, embarrassed, made false accusations, and given unjust punishments to Elise." (*Id.*) They also complained about Ms. Mayer's continued expressions of political views in the classroom, even after being asked to stop, and that Ms. Mayer ignored School policy by failing to teach Elise according to her special needs. (*Id.*) The Hahns demanded the "termination of Ms. Mayer's employment [and] reimbursement of funds to enroll Elise in a private school

since Clear Creek will not put her in another class." (*Id.*) Ms. Mayer states in her affidavit that she was shown this complaint for the first time at her deposition on May 20, 2005. (Mayer, Aff. ¶ 11).

On March 26, 2003, Principal Rogers sent another memorandum to Ms. Mayer, this time to set up a "meeting to discuss ongoing concerns/reminder." (Def.s' Memo in Supp. at 10; citing Rogers Dep., pp. 101-102, Exh. 15). Principal Rogers wrote that "it is imperative that we meet immediately to generally discuss concerns about your interactions with parents and your choice of classroom management strategies." (*Id.*) She also noted that the Hahns had filed "a complaint at the central administrative level." (*Id.*; Hahn Aff. ¶ 11, attached to Hahn Aff. as Exh. A) In addition to scheduling the meeting, Principal Rogers also directed Ms. Mayer to attend a workshop on "Dealing with Difficult Parents." (Rogers Dep., pp. 103-04, Exh. 15).

On March 27, 2003, Ms. Mayer met with Principal Rogers, the Director of Human Resources Pam Sklar, and the Monroe County Education Association Building Representative, Carol Carter, to discuss the problems in the LAUnCHED classroom, and more specifically, Ms. Mayer's problems with the Foshas and the Hahns. (Def. Memo in Supp. at 10; citing Rogers Dep., p. 119, Exh. "17"). Ms. Mayer was directed to consider these issues over the weekend and to advise Principal Rogers on Monday, March 31, 2003, of the steps she could take to remedy the situation. (*Id.*) However, Ms. Mayer failed to heed this directive, necessitating, on April 1, 2003, another letter from Principal Rogers to Ms. Mayer summarizing the events and directing her to respond by April 2, 2003:

> I must have your response toward solving this problem tomorrow. (4/2/03). Any longer delay is not acceptable. You have many strengths; however, communicating with parents constructively is an area of needed growth. Let's make this a success!

(*Id.*) Ms. Mayer did not report to work between April 1 and April 14, 2003, but did send an e-mail to Principal Rogers stating: "I am ill today and not able to respond to all of your comments. I will communicate with you as soon as I am able." (Def.s' Memo. in Supp. at 10; citing Mayer Dep., p. 125-126, Exh. 7 (Absence Report), Exh. 13). On April 6, 2003, Ms. Mayer sent Principal Rogers a three-page response to the April 1, 2003 letter. (Def.s' Memo in Supp. at 11, citing Mayer Dep. p. 130, Exh. 14). Ms. Mayer noted her "concern for the animosity that you [Principal Rogers] have directed toward me during the past few months," stating:

> Since the day I announced that I would be looking for employment elsewhere for next year as a result of the proposed RIF, you have taken measures to discredit me as a professional. Your pattern of behavior stemming from that time is incomprehensible to me and my colleagues but may explain why four teachers have occupied my present position in the past calendar year.

(*Id.*) She then listed 22 events of alleged harassment and claimed that due to this harassment she had missed five days of work due to illness. (*Id.*) She also noted that Principal Rogers had "a personal vendetta" against her and that "any further harassment, including the lack of a positive recommendation, will result in legal action on my behalf." (*Id.*)

On April 8, 2003, Ms. Mayer failed to attend a faculty meeting. (Def. Memo in Supp. at 11, citing Mayer Dep., p. 139, Exh. 15). Following the meeting, Principal Rogers sent a memorandum on April 9, 2003, suggesting to Ms. Mayer that she review the materials from the faculty meeting as they "would have been helpful to you in analyzing your interactions with parents and students." (*Id.*) She also asked Ms. Mayer to provide times for observations and the weekly progress meetings. (*Id.*) Ms. Mayer responded to the memorandum by agreeing to attend the progress meetings. (Mayer Dep., p. 139, Exh. 16).

Termination of Ms. Mayer's Employment

Principal Rogers visited Ms. Mayer's classroom for formal observations twice during the second semester, once on February 28, 2003, and again on April 16, 2003. (Def.s' Memo. in Supp. at 13; Rogers Dep., p. 23, Exh. 7, Exh. 8). On the basis of these observations, as well as other meetings and parent comments, on April 24, 2003, Principal Rogers prepared a Staff Member End-Of-Year report, (Pl.'s Memo. in Supp. at 13; Rogers Dep., p. 23, Exh. 14), in which she cataloged the problems with Ms. Mayer's performance and indicated that she would be recommending "Contract termination." (*Id.*) At a 1:00 pm meeting on April 24, 2003, Principal Rogers, Assistant Principal Miller, and Ms. Carter met with Ms. Mayer to discuss the End of Year report and Principal Rogers's recommendation. (Rogers Dep., p. 171; Mayer Dep., p. 143, Exh. 18). During the meeting, Ms. Mayer was given the opportunity to resign. (*Id.* at 144). Before responding to that option, Ms. Mayer left the meeting and then departed the building. (*Id.* at 144-146). Later that day, Ms. Mayer telephoned Principal Rogers to reject the resignation option and told Principal Rogers of her intention

to contact her attorney. (Rogers Dep., p. 172; Mayer Dep., p. 147, Exh. 18).

It is undisputed that the School Board met in a regularly scheduled public session on the evening of April 24, 2003 and unanimously voted not to renew Ms. Mayer's contract. (Mayer Dep. pp. 143, 149; Defendants' Responses to Plaintiff's First Request for Production of Documents, Minutes of Special Meeting). This lawsuit by Plaintiff challenging her termination ensued.

Legal Analysis

A. Standard of Review

Summary Judgment is appropriate where the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). On a motion for summary judgment, the burden rests on the moving party, Defendants in this case, to demonstrate "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325. After the moving party demonstrates the absence of a genuine issue for trial, the responsibility shifts to the non-movant to "go beyond the pleadings" and point to evidence of a genuine factual dispute precluding summary judgment. *Id.* at 322-24. "If the non-movant does not come forward with evidence that would reasonably permit the finder of fact to find in her favor on a material question, then the court must enter summary judgment against her." *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994), (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574,

585-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Celotex*, 477 U.S. at 322-24.

Summary judgment is not a substitute for a trial on the merits, nor is it a vehicle for resolving factual disputes. *Waldridge*, 24 F.3d at 920. Therefore, in considering a motion for summary judgment, we draw all reasonable inferences in favor of the non-movant. *Venters v. City of Delphi*, 123 F.3d 956, 962 (7th Cir. 1997). If genuine doubts remain and a reasonable fact-finder could find for the party opposing the motion, summary judgment is inappropriate. *See Shields Enters., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992). But if it is clear that a plaintiff will be unable to satisfy the legal requirements necessary to establish his or her case, summary judgment is not only appropriate, but mandated. *See Celotex*, 477 U.S. at 322; *Waldridge*, 24 F.3d at 920. Further, a failure to prove one essential element "necessarily renders all other facts immaterial." *Celotex* at 323. A plaintiff's self-serving statements, unsupported by specific concrete facts reflected in the record, cannot preclude summary judgment. *Albiero v. City of Kankakee*, 246 F.3d.927, 933 (7th Cir. 2001); *Slowiak v. Land O'Lakes*, Inc., 987 F.2d 1293, 1295 (7th Cir. 1993).

B. Count I: 1st Amendment Claim

Ms. Mayer asserts two First Amendment claims against the School: first, that in discussing her opposition to the Iraq war in the classroom, she exercised her First Amendment rights and that the School retaliated against her by harassing her and ultimately firing her. (Pl.'s Memo in Supp.; Complaint ¶¶ 20, 49). Her second claim is that Defendants' actions chilled her free speech entitlements. Defendants rejoin that Ms. Mayer's speech was not constitutionally protected because it occurred in her classroom in conjunction with her

role as a public school teacher, and not as an ordinary citizen. Therefore, both of her First Amendment retaliation claims fail as a matter of law. (Def.s' Reply in Supp. at 2). Plaintiff maintains that the war in Iraq is clearly a matter of great public interest and therefore her comments on the subject are protected by the First Amendment. In reviewing these claims, it is clear that, if Ms. Mayer's speech on the Iraq war is not protected under the First Amendment, then her retaliation claim-including her contract "non-renewal" claim and her "chilling free speech" claim must also fail.[4]

In *Gonzalez v. City of Chicago*, 239 F.3d 939, 940-941 (7th Cir. 2001) the Seventh Circuit laid out the two-step test under which claims by public employees asserting a violation against protected speech are to be analyzed:

> The first step, set forth in *Connick v. Myers*, is to determine whether the employee speaks "as a citizen upon matters of public concern." 461 U.S. 138, 147, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). The second step is to balance the "interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). In determining whether speech is protected at step one, we must consider the content,

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[4] The inquiry into the protected status of speech involves a legal analysis, not a factual one. *Connick*, 461 U.S. at 148, fn. 7. Further, the balancing of the interest in freedom of expression against the employer's interests is a function to be performed by the judge, not the jury. *Dishnow*, 77 F.3d at 198.

> form, and context of the speech. *Connick*, 461 U.S. 138, 147, 103 S. Ct. 1684, 75 L. Ed. 2d 708. Where speech is intended to serve a private or personal interest, it may not meet the standards for First Amendment protected speech. *See Kokkinis v. Ivkovich*, 185 F.3d 840, 844 (7th Cir. 1999). "Our precedent makes clear...that speaking up on a topic that may be deemed one of public importance does not automatically mean the employee's statements address a matter of public concern as that term is employed in *Connick*." *Id.*

Gonzalez, 239 F.3d at 940-941.[5]

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[5] Plaintiff argues that we should use the analysis the Seventh Circuit used in the 1996 case, *Dishnow v. School District of Rib Lake*, 77 F.3d 194, 197 (7th Cir. 1996). In this case the circuit court stated that when evaluating whether a public employee may be discharged or disciplined for speech, the public employee's First Amendment claim should be analyzed sequentially, in three steps: courts must (1) decide whether the speech, if uttered by someone who was not a public employee, would be protected; if so, then (2) decide whether the speech is merely a personal employee grievance of the type disqualified from protection in *Connick*; if so, the case is over; if not, then (3) decide whether the public employer had a "convincing reason to forbid the speech." *Dishnow v. School District of Rib Lake*, 77 F.3d 194, 197 (7th Cir. 1996). Limiting the analysis to whether the speech in the abstract, would be protected if uttered by a private citizen is too simplistic an approach for this case, and should be applied only in cases more closely in line with the facts of *Dishnow*, where a high school guidance counselor alleged that he was terminated in retaliation for informing the media of school board violations of law and for writing articles for a local newspaper on topics of interest to the public.

In *Pickering v. Board of Education*,[6] 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968), the Supreme Court held that public employees do not give up their First Amendment rights to comment on matters of public interest by accepting government employment, but that the State has an interest as an employer in regulating the speech of its employees which is unique from its interests in regulating the speech of its citizenry in general. *See also Connick v. Myers*, 461 U.S. 138, 140, 103 S. Ct. 1684, 75 L. Ed. 2d 708(1983).

Both parties agree that the topic of U.S. involvement in the Iraq war is a matter of public importance. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) (stating that the Vietnam war is a

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[6] In *Pickering*, the Court held impermissible under the First Amendment the dismissal of a high school teacher for openly criticizing the Board of Education on its allocation of school funds between athletics and education and its methods of informing taxpayers about the need for additional revenue. Pickering's subject was "a matter of public concern" upon which "free and open debate is vital to informed decision-making by the electorate." 391 U.S. at 571-72; quoted by *Connick*, 461 U.S. at 145. In *Pickering*, the teacher's erroneous public statements were:

> neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

Pickering, 391 U.S. at 572-73.

matter of public concern).[7] The role of the speaker is relevant because courts are more protective of citizen speech than they are of employee speech. *See Gonzalez v. City of Chicago*, 239 F.3d 939, 940 (7th Cir. 2001) (noting that employee of the Chicago Police Department investigating and writing reports of public complaints against officers was performing a "routine requirement of the job" and thus the reports were not protected speech by a citizen which touched upon matters of public concern); *Youker v. Schoenenberger*, 22 F.3d 163, 166 (7th Cir. 1994) ("Simply stated, the speech in the present case is not protected because it was not a speech as a citizen [because the employee used an official medium to convey his

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[7] In *Tinker*, students wore black armbands to school in order to protest the Vietnam War. The school banned the armbands under its dress code and the students challenged the school's policy based upon its impact on their First Amendment rights. The Supreme Court found that the student speech protesting the war pertained to a matter of public concern and was protected. (*Id.*) "The Supreme Court has more than once instructed that '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *James v. Board of Education*, 461 F.2d 566, 568 (2nd Cir. 1972), *citing Shelton v. Tucker*, 364 U.S. 479, 487, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960), quoted in *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 512, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

message].").[8] The courts are less protective of government interference in employee speech because —

> the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Connick, 461 U.S. at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974) (J. Powell, separate opinion)).

In analyzing the content in which the challenged speech occurred, it should be noted that the classroom is unique in that it is under the exclusive control of the school board and "public school teachers are not free, under the First Amendment, to arrogate control of the curricula." *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 369 (4th Cir. 1998) (selection of a controversial school play in drama class) (quoting *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d

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[8] *Youker* is distinguishable from the holding in *Pickering*, where the Court noted that the Plaintiff's employment was only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, and therefore the teacher should be regarded as a member of the general public. *Pickering*, 391 U.S. at 574.

794, 802 (5th Cir. 1989) (use of unapproved and controversial reading list in class)).[9] In *Tinker*, the Supreme Court wrote:

> If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school.

Tinker, 393 U.S. at 513. We do not believe that the inverse is true, however; school officials are free to adopt regulations prohibiting classroom discussion of the war in Iraq while allowing teachers and students the opportunity to engage in discussions about the war elsewhere on school property without violating First Amendment protections.[10]

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[9] Plaintiff's equivocations as to whether her speech was public or private is essentially irrelevant, as Plaintiff herself points out, citing *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 414, 99 S. Ct. 693, 58 L. Ed. 2d 619 (1979) (holding that a public employee does not forfeit his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly). (Pl. Resp. at 14.)

[10] In the Supreme Court's recent decision *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297, 164 L. Ed. 2d 156, 2006 WL 521237, *9 (U.S.) (Mar. 6, 2006) the Court noted that "many of its leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." These types

Ms. Mayer's comment on this matter of public concern occurred during a classroom instruction session based on approved curriculum and in response to a legitimate, altogether appropriate question from a student. In her Complaint, Ms. Mayer acknowledges, however, that she went beyond merely discussing the TFK article with her LAUnCHED class by expressly interjecting her own personal views and activities against the war in Iraq. (Def.s' Memo. in Supp. at 18; Complaint, ¶ 19-20).[11] Teachers, including Ms. Mayer, do not have a right under the First Amendment to express their opinions with their students during the instructional period, particularly if the teacher's supervisors have directed her not to do so. Here, the fact that Ms. Mayer's January 10, 2003 comments were made prior to any prohibitions by school officials does not establish that she had a First Amendment right to make these comments in the first

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of cases, are distinguishable from the case at hand, where the Plaintiff, Ms. Mayer, is being prohibited from particular speech during class time, and not forced to speak on a particular topic. For example in "*West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 1628(1943), [the Supreme Court] held unconstitutional a state law requiring schoolchildren to recite the Pledge of Allegiance and to salute the flag. And in *Wooley v. Maynard*, 430.U.S. 705, 717, 97 S. Ct. 1428, 51 L. Ed.2d 752 (1977), we held unconstitutional another that required New Hampshire motorists to display the state motto-"Live Free or Die"-on their license plates." *Rumsfeld*, 2006 WL 521237 at *9.

[11] Defendants state: "According to the parents, Ms. Mayer did this on several occasions, even after she was asked not to by Principal Rogers." (Def. Memo in Supp. at 18; Hahn Aff., ¶ 9; Rogers Dep., p. 87). However, the frequency of Ms. Mayer's statements is clearly a disputed factual issue and therefore not appropriate for adoption on summary judgment. In this ruling, we are determining whether the comments made on January 10, 2003 were protected.

place. Previous judicial holdings have recognized that teachers do not have a First Amendment right to arrogate control of the curricula. Elementary school classrooms in which the teacher has considerable influence over her students and where the students are required to be in attendance are highly unique settings. Ms. Mayer, and teachers, generally, may find it difficult to lead a meaningful discussion without interjecting their personal opinions on important political topics; we assume in fact that, some school boards may encourage teachers to do so, in a balanced fashion. The point is that whatever the school board adopts as policy regarding what teachers are permitted to express in terms of their opinions on current events during the instructional period, that policy controls and there is no First Amendment right permitting teachers to do otherwise.[12] Had this case involved limitations or prohibitions on Ms. Mayer by the School regarding her practice of "honking for peace" off the school grounds, or writing editorials to the local newspaper, or discussing the Iraq war with other teachers at a time other than during the instructional period, we would expect a different outcome.

In summary, because the uncontroverted facts establish that Ms. Mayer expressed her views to her students at a time and place and as part of her official classroom instruction, she was acting as an "employee," rather than as a "citizen," so that her speech was not constitutionally protected. Thus, we do not need to undertake the kind of balancing called for in *Pickering*. Defendants are entitled to summary judgment as a

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[12] To hold otherwise, would be to say that an elementary school teacher has a constitutional right to speak without limitation on any matter of public concern with her students during valuable instruction time.

matter of law on Ms. Mayer's First Amendment claims, including her retaliation and "chilling" claims. Summary judgment therefore shall be entered on Count I of Plaintiff's Complaint.

C. Count II: 42 U.S.C. § 1985 Claim

In Count II of her Complaint, Ms. Mayer invokes the protections of 42 U.S.C. § 1985, alleging that "Defendants conspired together to develop a plan of retaliation against Plaintiff and to stifle or chill her exercise of her First Amendment rights to free speech and to petition the government for redress of grievances." (Complaint, ¶ 51). Defendants contend that no claim under § 1985(3) is available to Ms. Mayer because that statute does not apply in the context of an "intra-corporate conspiracy" and further it does not apply to a deprivation of First Amendment rights, but only to Fourteenth Amendment equal protection claims. Plaintiff has not responded to these arguments. Def. Memo. in Supp. at 24.

In *Trautvetter v. Quick*, 916 F.2d 1140 (7th Cir. 1990), the Seventh Circuit stated:

> Under 42 U.S.C. § 1985(3), a plaintiff must allege four elements to make out a valid cause of action:
>
> 1. a conspiracy;
>
> 2. a purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;
>
> 3. an act in furtherance of the conspiracy, and;

4. an injury to his person or property or a deprivation of any right or privilege of a citizen of the United States.

Id., 916 F.2d at 1153.

The first element of a § 1985(3) claim requires that there be evidence of a "conspiracy." In the case at bar, the Complaint alleges that "defendants conspired together." (Complaint, ¶ 51). As noted in paragraphs 6-13 of the Complaint, each of the individual Defendants, Superintendent Malloy, Board President Brown, Principal Rogers, and Director Sklar is "employed" by the school corporation. (*Id.*, ¶¶ 6, 8, 10, 12). Because Ms. Mayer has admitted that each of the alleged conspirators is employed by the school corporation, conspiracy claims are barred by the "intra-corporate conspiracy" doctrine.

The "intra-corporate conspiracy" doctrine states that intra-corporate discussions and actions which have a discriminatory impact "will normally not constitute the conspiracy contemplated by this statute [1985]." *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972). In *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108 (7th Cir. 1990), the Court reaffirmed the holding in *Dombrowski*, as follows:

> Again, intra-corporate discussions lie outside the statute's [§ 1985(3)] domain...managers of a corporation jointly pursuing its lawful business do not become "conspirators" when acts within the scope of their employment are said to be discriminatory or retaliatory...Now that the question has been presented for decision, we conclude that it does not matter whether the corporate managers took multiple steps to

> carry out their plan; intra-corporate discussions are not 'conspiracies.'

Travis, 921 F.2d at 110-111. The Seventh Circuit applied this doctrine to governmental entities in *Wright v. Ill. Dep't. of Children and Family Servs.*, 40 F.3d 1492, 1508 (7th Cir. 1994).

Because the Complaint contains only allegations of intra-corporate discussions between the individual Defendants, all of whom are school corporation employees, no conspiracy under 42 U.S.C. § 1985(3) can be found to exist as a matter of law, and consequently, Count II of Plaintiff's Complaint warrants dismissal on summary judgment.[13]

D. Count III: Breach of Employment Contract

In Count III of her Complaint, Ms. Mayer alleges that the School's action of non-renewal of her Regular Teacher's Contract constituted a "breach of the employment contract." (Complaint, ¶ 56). More specifically, she alleges that the School improperly failed to renew her contract even though she had "fully performed her obligations pursuant to her contract of employment." (Complaint, ¶ 54). Indiana courts have stated that the decisions of school boards to non-renew non-tenured teacher contracts "should not be disturbed except in cases where it is arbitrary and capricious, without reasonable basis or in direct violation of the Constitution." *Tilton v. Southwest School Corp.*, 151 Ind. App. 608, 631,

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[13] Because Count II of Plaintiff's Complaint is dismissed for the specified reasons, we do not address Defendants' contention that Ms. Mayer's § 1985(3) claims also must fail because they do not involve racial or class-based animus. Def.s' Memo in Supp. at 25.

281 N.E.2d 117 (1972) (interpreting an earlier version of Indiana's Teacher Tenure Act).

The Indiana's Teacher Tenure Act (I.C. § 20-6.1-5-6, et seq.) ("Tenure Act") governs the hiring and firing of teachers by public school corporations and its protections are incorporated fully into Ms. Mayer's contract. The statute creates three classifications for teachers: non-permanent, semi-permanent, and permanent teachers. Under the Tenure Act, a non-permanent teacher, such as Ms Mayer, has been employed for two years or less and may be terminated "(1) for any reason considered relevant to the school corporation's interest; or (2) because of a teacher's inability to perform the teacher's teaching duties." (I.C. § 20-6.1-4-14(i)).

Defendants contend that the reason the School cancelled Ms. Mayer's nonpermanent teaching contract was based upon her inability to work effectively with students and parents. This contention is reflected in the recorded created for this litigation and specifically in the End of Year Report and March 26, 2003 Memo. Defendants further contend that Ms. Mayer refused to follow the directives from her superiors, failed to follow school policy in terms of her absences, and failed to correct these various deficiencies after being apprised of them through multiple evaluations. Defendants assert that Ms. Mayer's conduct easily meets the statutory requirements. Def. Memo in Supp. at 16.

Plaintiff objects to summary judgment on this claim, contending that, contrary to school policy and her contract, Plaintiff was never advised of any parent complaints by Defendants, other than the Hahns' complaint about Plaintiff's

speech and the Foshas' complaint about a hand gesture.[14] Plaintiff contends that "the decision to terminate any teacher — permanent or non-permanent — cannot be based on complaints that have not been brought to the teacher's attention." Mayer Surreply, at 3 (citing Sklar Dep., p. 70). While questions of fact regarding whether Plaintiff was aware of every complaint made against her may exist, they are not material factual disputes.[15] On the basis of the Hahns' and the

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[14] Most of Plaintiff's argument in this respect is irrelevant based on our holding that Plaintiff did not have a First Amendment right to express her opinions on the war in Iraq with her students during the classroom instructional period. Plaintiff frames her argument as follows:

> Assuming that terminating Plaintiff's contract for an illegal reason could not, as a matter of law, be considered a reason 'relevant to the school corporation's interest,' and assuming further that the jury finds in Plaintiff's favor on her First Amendment claims, it would logically follow that Mayer's contract was not terminated because of any inability to perform her duties. Stated differently, in the absence of the alleged illegal conduct by Defendants in this case, it is reasonable to infer that Plaintiff would have been renewed and would have continued to work for MCCSC. Mayer's intent, as Defendants knew, was to work into an administration position with the school:

(Pl.'s Resp. at 34, citing Mayer Dep., pp. 45-46).

[15] The numerous affidavits submitted by parents, and the deposition of Principal Rogers, as well as corresponding exhibits support the position that Ms. Mayer was aware that parents were complaining of her teaching techniques. Ms. Mayer's "self-serving statements, unsupported by specific concrete facts reflected in the record" that

Foshas' complaints alone, school officials would be justified in concluding that Ms. Mayer's termination would be (1) in the school corporation's interest or (2) evidence of Ms. Mayer's inability to perform her teaching duties. *See* IND. CODE § 20-6.1-4-14(i). Therefore, summary judgment shall issue as to Count III of Ms. Mayer's Complaint alleging breach of her employment contract.

E. Count IV: Indiana Code § 20-6.1-4-14

Finally, in Count IV of the Complaint, Ms. Mayer alleges that the School failed to comply with the requirements of IND. CODE § 20-6.1-4-14[16] by (1) failing to give her a statement of reasons for the non-renewal of her contract; (2) refusing to provide an appropriate written evaluation; (3) refusing to permit a conference with the School Board; and (4) failing to have an appropriate reason for nonrenewal.[17] Ms. Mayer has failed to respond to Defendants' arguments

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she was unaware of these complaints will not suffice to preclude summary judgment. *Albiero v. City of Kankakee*, 246 F.3d 927, 933 (7th Cir. 2001).

[16] At the time this opinion is being issued, Ind. Code Article 6.1, titled "Teachers" has been repealed by repealed by P.L. 1-2005, sec. 240, effective July 1, 2005 and in relevant part by Ind. Code §§ 20-28-7-8 (continuation of contract), 20-28-7-9 (rights of nonpermanent teacher — evaluations — notice of consideration of nonrenewal), 20-28-7-10 (right of nonpermanent teacher to conference -- procedure).

[17] Defendants note that ground [4] is redundant to Count III and that our resolution of that issue necessarily covers this re-stated contention. *See* Def. Memo in Supp. at 26 n.6. We agree, holding that Defendants had an appropriate reason for non-renewal of Plaintiff, as discussed *supra* Section D.

regarding Count IV, based on IND. CODE § 20-6.1-4-14 and, therefore, we shall assume that the facts and evidence adduced by Defendants on these issues exist without controversy and are controlling of our analysis. (*See* L.R. 56.1 (e)).

With non-permanent teachers such as Ms. Mayer, Indiana law lays out three conditions precedent to the nonrenewal of their contracts: (1) the school shall "provide the teacher with an annual written evaluation of the teacher's performance before January 1 of each year;" (2) "On or before May 1, the school corporation shall notify the teacher that the governing body will consider nonrenewal of the contract;" and, (3) "Upon the request of the teacher, and within fifteen (15) days of the receipt of the notice of the consideration of contract of nonrenewal, the...[School] shall provide the teacher with a written statement...giving the reasons for the noncontinuation of the teacher's contract." Def.s' Memo in Supp. at 27. Compliance with these three requirements is a "condition[] precedent to a valid nonrenewal of a contract," and the failure to comply with all of them will invalidate the cancellation or nonrenewal decision. *Lewis v. Bd. of Sch. Trs. of the Charles A. Beard Mem'l Sch. Corp.*, 657 N.E.2d 180, 184 (Ind. Ct. App. 1995). In contrast, the statutorily-mandated conference with the school board is not deemed a condition precedent, and, if a school fails to hold such a meeting, the appropriate remedy is to remand the matter to the school board to permit the conference to be conducted. (*Id.*)

1. *Annual Written Evaluation*

Ms. Mayer claims that the School "refused to provide appropriate written evaluations" to her. (Complaint, ¶ 58). In particular, she appears to argue that Principal Rogers failed to give her an evaluation prior to January 1, 2003. However,

this contention ignores the fact that prior to January 1, 2003, Ms. Mayer had received a completed "Form B: Professional Staff Evaluation," prepared by Assistant Principal Miller on November 21, 2002. (Def.s' Memo in Supp. at 28; citing Miller Dep. pp. 59-61; Exh. 6). Thereafter, Ms. Mayer received two additional evaluations, one in February and one in April of 2003, from the School. (Rogers Dep, p. 23, Exh. 7, Exh. 8). Principal Rogers also prepared an End of Year Report, utilizing Form D, reflecting her assessments of Ms. Mayer's performance. (Rogers Dep., p. 23, Exh. 14).

We agree with Defendants that, while IND. CODE § 20-6.1-4-14 requires an "annual written evaluation of the teacher's performance before January 1 of each year," it does not specify the form or format for that evaluation, apparently leaving that to the discretion of the Schools and the teachers' unions. (*See* Def.s' Memo in Support at 29). Here, the School utilized "Form B: Professional Staff Evaluation," and the statute does not forbid that. Therefore, we find that the first requirement of IND. CODE § 20-6.1-4-14 was satisfied by Defendants.

2. *Written Statement Giving Reasons for the Noncontinuation of the Teacher's Contract*

Ms. Mayer cites, as a first basis for her breach of contract claim under IND. CODE § 20-6.1-4-14, that the School "refused to give Plaintiff a statement providing the reasons for the non-continuation of Plaintiff's contract." (Complaint, ¶ 58).

Under IND. CODE § 20-6.1-4-14(b):

> "Before a teacher is refused continuation of the contract under subsection (a), the teacher has the

> following rights, which shall be strictly construed: Upon the request of the teacher, and within fifteen (15) days of the receipt of the notice of the consideration of contract of nonrenewal, the...[School] shall provide the teacher with a written statement... giving the reasons for the noncontinuation of the teacher's contract."

This requirement is mandatory and its fulfillment is a condition precedent to the proper termination of Ms. Mayer's contract. *Lewis v. Bd of Sch. Trs. of the Charles A. Beard Mem'l Sch. Corp.*, 657 N.E.2d 180, 184 (Ind. Ct. App. 1995).

The problem with Plaintiff's claim is that the statute imposes the obligation on the teacher to first "request" the statement of reasons. The evidence here establishes that Ms. Mayer never requested such a statement of reasons for her termination. (Def.s' Memo in Supp. at 28). During the meeting on April 24, 2003, Ms. Mayer was informed that Principal Rogers was going to be recommending the nonrenewal of her contract at the School Board hearing scheduled for that evening. (Mayer Depo., p. 143-149). Ms. Mayer testified that immediately after the meeting with Principal Rogers she went to the school office to find a substitute teacher to cover her class and then went directly home. (*Id.* at 144-147). Ms. Mayer testified that she telephoned Principal Rogers later that day to inform her that she was not resigning and that "the school system had not followed proper procedure in [her] dismissal and that [she] was contacting [her] attorney." (*Id.*) Nonetheless, the School Board terminated Ms. Mayer's contract at its meeting on the evening of April 24, 2003. Because Ms. Mayer never requested a statement of the reasons for her termination, the School was not required to provide it to her. (Def.s' Memo in

Supp. at 28, citing IND. CODE § 20-6.1-4-14(b)). Therefore, the third requirement of IND. CODE § 20-6.1-4-14 was not violated by the Defendants.

3. *School Board Conference*

The final reason that Ms. Mayer cites as the basis for her breach of contract claim and her claims under I.C. § 20-6.1-4-14 is that the School "refused to hold a conference with the governing body of the School Corporation." (Complaint, ¶ 58). Such a conference is not a condition precedent to contract termination, and the appropriate remedy for the failure to conduct that meeting is to remand the matter to the School Board to do it. *Lewis v. Bd of Sch. Trs. of the Charles A. Beard Mem'l Sch. Corp.*, 657 N.E.2d 180, 184.

Defendants state that 'there is no dispute that the Tenure Act requires a school, if requested to do so by the teacher, to provide that teacher a conference after the nonrenewal of a teacher's contract." Def.s' Memo in Supp. at 31. Indiana Code § 20-6.1-4-14(a)(3) provides that "[a] conference shall be held with the governing body, or at the direction of the governing body, with the superintendent or the superintendent's designee, not more than ten (10) days following the day the governing body receives the request." There is no dispute that, following after Ms. Mayer's non-renewal on April 24, 2003, she initially requested such a conference. (Mayer Depo. p. 175, Exh. 7 (Fax to Ms. Sklar)). It is also undisputed that the School offered to schedule the conference. However, the parties ultimately agreed that no conference was needed, as documented in a letter from Ms. Mayer's former attorney dated July 17, 2003: "We also confirm the agreement made that there would be no need to request a conference with the School Board as required by IC 20-6.1-4-14 because both sides agree that such

a conference would be an act of futility." (Def.s' Memo in Supp. at 31; Mayer Depo., p. 175; Defendants' Responses to Plaintiff's First Request for Production of Documents, 7/17/03 letter). Because it appears that the parties jointly agreed that a conference was unnecessary and would be, indeed, an act of futility, Ms. Mayer's contention that the School failed to offer her a conference lacks any evidentiary support. Accordingly, Count IV is also subject to summary judgment.

F. Claims Against Individual Defendants

Having dismissed the four counts of Plaintiff's complaint on summary judgment we need not address Defendants' argument that each of the individual Defendants is entitled to judgment in their favor as a matter of law.[18]

Conclusion

For the foregoing reasons, we hold that Defendants are entitled to summary judgment in their favor on all Counts. IT IS SO ORDERED.

Date: 03/10/2006 /s/
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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[18] The School sought summary judgment on the official capacity claims under § 1983 against the individual Defendants and on the federal claims against the individual Defendants based upon qualified immunity. The School also sought dismissal of the individual Defendants as to Count III and IV of the Complaint based on a lack of privity regarding the employment contract between Plaintiff and the School.

JUDGMENT

Pursuant to the Court's entry of this date granting Defendants' motion for summary judgment, final judgment is entered in favor of Defendants. Each party shall bear its own costs.

IT IS SO ORDERED.

Date: 03/10/2006 /s/

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

APPENDIX D

http://www.timeforkids.com

WORLD REPORT EDITION
Volume 8, No. 11

[December 13, 2002]

Searching Iraq

With the possibility of war ahead, U.N. inspectors look for illegal weapons in Iraq

Long caravans of official United Nations Jeeps have been winding their way in and around Iraq's capital, Baghdad, for the last two weeks. The U.N. officials riding inside have been working around the clock, visiting factories, medical labs, government headquarters and even the private palaces of Iraq's president, Saddam Hussein. The officials are highly trained weapons inspectors on a search for illegal weapons that U.S. leaders believe are hidden in Iraq.

This is no simple game of hide-and-seek. Finding illegal weapons would have explosive consequences for Iraq and the rest of the world. Already, thousands of U.S., British and other troops are positioning themselves in countries along Iraq's border. If illegal weapons are found, it will almost certainly mean war.

Is Iraq Hiding Weapons?

The U.S. and Great Britain claim they have information showing that Iraq has been developing "weapons of mass destruction." Such chemical, germ and nuclear weapons have the power to kill thousands of people at once. Under an international agreement signed after the 1991 Persian Gulf War, Iraq was forbidden to have these terrible weapons.

Although Iraq denies having the weapons, the U.N. voted last month to send inspectors to search the country. The U.N. Security Council, in an official statement, said that Iraq must give the inspectors full access to all parts of the country. It also gave Iraq a December 8 deadline to provide a complete list of all of its weapons of mass destruction.

"That declaration must be credible and complete," President George Bush said last week. "Any delay, deception or defiance will prove Saddam Hussein has rejected the path of peace."

The report had not yet been submitted when TFK went to press, but Iraq is expected to stick to its story. "We have no weapons of mass destruction," said General Hussam Mohammed Amin, who was in charge of writing the declaration to the U.N.

Once the U.N. inspectors have the report, they will compare it to their findings on the ground in Iraq. Weapons inspectors have been in Iraq before. After the Gulf war, when Iraq agreed to get rid of its dangerous weapons, U.N. inspectors were sent in to make sure that the country was keeping its promise. But inspectors were not given access to many places where weapons could have been stored.

A Tough Inspection

The new U.N resolution calls for inspections to pick up where inspectors left off in 1998. But this time, they will have unrestricted access. The work will be done by almost 300 trained specialists from 48 countries.

Inspectors will be looking everywhere, including underground. The team is equipped with devices that can detect chemicals used in weapons of mass destruction. The inspectors must report what they find to the U.N. by February 21.

On the Brink of War

If Iraq fails to cooperate or the inspectors find hidden weapons, President Bush will likely order an attack on Iraq. He says he favors a change in Iraq's regime, or leadership, if the country is breaking U.N. rules.

Opinion polls show that 58% of Americans would support such an attack. Still, many are speaking out against it. A big antiwar rally is scheduled in Washington, D.C., this week. "There are other ways to deal with [Hussein] besides bombing," says peace activist Elke Heitmeyer. "Wars will only create more violence."

The U.N. inspectors are well aware of what's at stake. They have more than 1,000 sites to search as the world waits for their report. It may be weeks before the U.S. decides what to do about Iraq.

By Ritu Upadhyay

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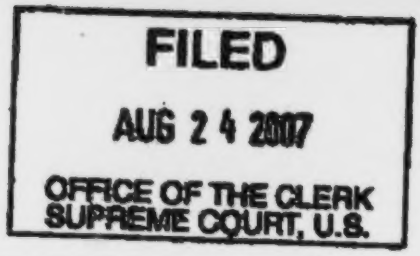

(2)

No. 06-1657

IN THE

Supreme Court of the United States

DEBORAH A. MAYER,

Petitioner,

v.

MONROE COUNTY COMMUNITY SCHOOL CORPORATION, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Thomas E. Wheeler, II, Esq.
Locke, Reynolds, LLP
1000 Capital Center
201 N. Illinois Street
Indianapolis, IN 46204
(317) 237-3800

QUESTION PRESENTED

1. Whether this Court ought to adhere to the "basic constitutional obligation [of] avoiding unnecessary decision of constitutional questions" by dismissing the Petition based upon the Petitioner's failure to appeal the District Court's finding that her speech was not the motivating factor for the non-renewal of her teaching contract?

2. Whether the Seventh Circuit erred in utilizing this Court's decision in *Garcetti v. Ceballos* to find that the in-class curricular speech of an elementary school teacher is not subject to First Amendment protection?

PARTIES TO THE PROCEEDING

The Petitioner has accurately listed the parties to the proceeding pursuant to Rule 14.1(b).

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STATEMENT OF THE CASE

The Petition asks the Court to effectively constitutionalize the day-to-day interactions between supervisors and subordinates within the Nation's public schools, a proposition that this Court rejected in its decision in *Garcetti v. Ceballos*. The Petitioner, Deborah Mayer, was a failing teacher who interjected her personal opinions regarding the Iraq war into her elementary school classroom. She sought to use her speech and the First Amendment in order to reinstate her employment with the Respondent, the Monroe County Community School Corporation.

I. Pre-Speech Performance Problems.

It is telling that in her Petition Ms. Mayer begins the factual narrative with an event that took place on January 10, 2003, ignoring earlier events that year. Two weeks into the 2002-03 school year Ms. Mayer was moved from a substitute teaching position into a full-time position when the regular teacher abruptly resigned. App. 12a. Ms. Mayer's classroom contained children in grades 3-6, most of whom had learning difficulties, and some of whom were receiving special education. App. 12a, 22a.

Parental complaints about Ms. Mayer's demeanor, conduct towards students, and professional competency surfaced almost immediately. These complaints were initially directed to the Principal Victoria Rogers who tried to handle them informally. They were also raised directly with Ms. Mayer during parent-teacher conferences held in October of 2002. App. 18a, 20a-23a. In all, seven families presented complaints during the first semester, well before the speech on January 10, 2003. *Id.*

During the first semester Principal Rogers attempted to quell the parents' concerns by noting that Ms. Mayer was a

new teacher and needed some time to get acclimated to her new classroom and the students. This approach was successful for a short time. However, as Christmas approached unhappy parents began demanding that their children be moved out of Ms. Mayer's classroom. App 20a, 21a, 23a. Several parents also began to complain that Ms. Mayer had begun retaliating against their children for their earlier complaints during the parent-teacher conferences. Principal Rogers attempted to accommodate the most vocal parents by transferring their children into other classrooms. App. 19a, 20a, 21a, 23a.

After she had moved four of the students out of Ms. Mayer's class, Principal Rogers was unable to accommodate any more transfers. App. 17a. One set of parents was so unhappy with Ms. Mayer and the School's inability to accommodate their transfer request that they removed their child from school, enrolled her at a private school, and requested that the School pay for her education. App. 17a. Two other sets of parents filed formal harassment complaints against Ms. Mayer under the School's anti-harassment policy alleging that Ms. Mayer had harassed and "verbally threatened" their children. App. 23a-24a.

II. The *Time for Kids* Article.

It was within the context of this parental revolt, that on January 10, 2003, Ms. Mayer used a *Time for Kids* article to engage in a brief discussion of her personal opinions on war protests. This discussion "lasted probably no more that five minutes." App. 13a. During that time Ms. Mayer testified that she told the class that "[w]hen I drive past the courthouse square and the demonstrators are picketing I honk my horn because their signs say, 'Honk for Peace.'" *Id.* Ms. Mayer also stated that she told the class that "people ought to seek out peaceful solution to problems before going to war." *Id.*

Despite the brevity and relative innocuous nature of the discussion, one set of parents with whom Ms. Mayer had a particularly bad relationship seized upon these statements as yet another example of why Ms. Mayer was incompetent and why their daughter should be permitted to move out of her classroom. App. 14a. On January 13, 2003, Principal Rogers held a meeting with Ms. Mayer and these parents to try and diffuse the situation. *Id.* This meeting resulted in a memorandum being circulated to parents and staff noting that "[w]e absolutely do not, as a school, promote any particular view on foreign policy related to the situation with Iraq. That is not our business. Individuals in a democracy have personal beliefs, but a public school acknowledges various points of view and those might be discussed related [to] current events and news." App. 15a.

During the second semester Ms. Mayer's problems with parents continued and intensified. Parents continued to demand that their children be transferred from her class and continued to express the belief that their children were the subject of retaliation by Ms Mayer for prior complaints. These concerns are discussed in great detail in the District Court opinion and that discussion is incorporated herein by reference. App. 15a-24a. Having been unable to quell the problems in the classroom through meetings with parents, meetings with Ms. Mayer and student transfers, on February 7, 2003, Principal Rogers sent Ms. Mayer a "formal letter of concern" referring to the "volatile situation" in the classroom, the fact that she had been forced to move several students, and placing Ms. Mayer on an improvement plan designed to address her deficiencies. App. 24a.

Over the next two months, despite the improvement plan, Ms. Mayer's job performance progressively deteriorated and there were several meetings between she and various administrators to try to address the performance problems. App. 25a-26a.

After several attempts to respond to these increasingly serious problems were ignored by Ms. Mayer (App. 25a), on April 1, 2003, Principal Rogers sent her a letter summarizing the concerns and directing Ms. Mayer to respond in writing by April 2, 2003. *Id.* Rather than respond, upon receipt of Principal Roger's letter, Ms. Mayer simply stopped coming to work, missing the next two weeks and sent an e-mail stating that "I am ill today and not able to respond to all of your comments." App. 26a.

When Ms. Mayer did eventually respond to the letter of concern with her own three page single spaced letter of April 6, 2003, the letter never mentioned the Iraq war speech as a source of her problems. Instead, in the letter Ms. Mayer noted her "concern for the animosity that you [Principal Rogers] have directed toward me during the past few months." App. 26a (parenthetical supplied). Rather than attribute that animosity towards the Iraq war comments, Ms. Mayer instead attributed it as follows:

> Since the day I announced that I would be looking for employment elsewhere for next year as a result of the proposed RIF, you have taken measures to discredit me as a professional. Your pattern of behavior stemming from that time is incomprehensible to me and my colleagues but may explain why four teachers have occupied my present position in the past calendar year.

App. 26a. Ms. Mayer then listed twenty-two events which she believed to be harassment and noted that Principal Rogers had "a personal vendetta" against her and that "[a]ny further harassment, including the lack of a positive recommendation, will result in legal action on my behalf." *Id.* Yet despite the laundry list of concerns and the threatened legal action, the letter never mentions the Iraq war

speech or even suggest that the "harassment" by Principal Rogers was caused by Ms. Mayer's classroom comments. *Id.*

Ms. Mayer then skipped faculty meetings, refused suggestions to improve, and when she did return to the classroom her performance was poor. App. 27a. Following multiple observations and evaluations, on April 24, 2003, Principal Rogers decided to recommend the non-renewal of Ms. Mayer's teaching contract to the School Board. *Id.* On that same date she met with Ms. Mayer and advised her of this and gave Ms. Mayer the opportunity to resign. *Id.* Rather than respond, Ms. Mayer simply got up and left the building, despite having classroom responsibilities. *Id.* Later that day she called Principal Rogers and rejected the resignation option, stating that she was going to have her attorney respond. App. 28a.

During a meeting on April 24, 2003, the School Board voted unanimously not to renew Ms. Mayer's teaching contract. App. 28a.

SUMMARY OF THE ARGUMENT

The Petition should be denied for two reasons. First, in ruling on the School's summary judgment motion the District Court found, as a matter of law, that Ms. Mayer's speech was not the motivating factor for the non-renewal of her teaching contract. Ms. Mayer did not appeal this decision, thus dooming her First Amendment claim regardless of whether this Court were to find the speech protected. Accepting the Petition on the issue of whether the speech is protected would be a useless act since even if the speech is protected, Ms. Mayer's claims ultimately lose due to her failure to appeal the Court's decision on Counts III and IV of her Complaint. Given the Court's "basic constitutional obligation of avoiding unnecessary decision of

constitutional questions" the Court should not grant the Petition because it would be, in effect, a useless act.

Second, the Seventh Circuit properly applied this Court's decision in *Garcetti v. Ceballos* to find that job related speech by an elementary school teacher is not protected by the First Amendment. To the extent that *Garcetti* reserved an issue regarding academic freedom rights, that issue was limited to speech by college and university professors, not elementary school teachers. Because the Seventh Circuit properly applied this Court's decision in *Garcetti v. Ceballos*, the Court should deny the Petition for this reason as well.

REASONS FOR DENYING THE PETITION

In *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) this Court set forth the framework to be used when addressing the question of whether the First Amendment applies to job related speech by public employees. In that decision the Court discussed the two part framework for analyzing such claims:

> The first [part] requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises [and *Pickering* balancing takes place].

Garcetti, 126 S.Ct. at 1958 (parenthetical supplied).

In the present case the Seventh Circuit, applying *Garcetti*, held that primary and secondary schoolteachers speaking in class as part of their teaching assignment speak

as employees, not as citizens, and thus such speech is not protected. Ms. Mayer asks this Court to reverse the Seventh Circuit and find, contrary to *Garcetti*, that such teachers do indeed have such First Amendment rights.

I. The Court need not address the constitutional issue raised as the case may be easily resolved on non-constitutional grounds.

As an initial matter, the School requests that this Court deny the Petition based upon the "basic constitutional obligation of avoiding unnecessary decision of constitutional questions. *See Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ('The Court will not pass upon a constitutional question although properly presented on the record, if there is also present some other ground upon which the case may be disposed of')." *Morse v. Frederick*, 127 S.Ct. 2618, 2640 (2007) (Breyer, J. concurring in part).

In the present case there is no need for the Court to address the issue presented in the Petition as even if Ms. Mayer's speech were found to be protected, she cannot as a matter of law present a *prima facie* case of retaliation since the District Court found her termination was justified on grounds other than speech (*i.e.* the classroom problems and parental disputes) and she failed to appeal that decision. App. 40a.

While the District Court did not engage in *Pickering* balancing since it found that Ms. Mayer's speech was not protected in the first instance under the First Amendment, the Court nevertheless was still required to assess the validity and viability of the School's reasons for discharging Ms. Mayer based on its resolution of Counts III and IV of the Complaint. Count I of the Complaint was the First Amendment claim that is the subject of this petition. Count

III of the Complaint was a state law breach of employment contract claim. App. 40a. Count IV of the Complaint was a state law claim contending that the School did not comply with certain of the statutory requisites for non-renewing Ms. Mayer's contract. App. 43a.

With respect to Counts III and IV, the District Court granted the School summary judgment finding that the non-renewal of Ms. Mayer's contract was not based on her speech, but was instead based on her job performance and the parental complaints: "On the basis of the Hahns' and the Foshas' complaints alone, school officials would be justified in concluding that Ms. Mayer's termination would be (1) in the school corporation's interest or (2) evidence of Ms. Mayer's inability to perform her teaching duties." App. 43a. Ms. Mayer did not appeal the entry of summary judgment on Counts III and IV, limiting her appeal to the First Amendment issue presented in Count I. App. 4a.

Assuming for purposes of argument that Ms. Mayer were able to overcome the *Garcetti* hurdle and demonstrate that her speech was protected, she then faces the burden of presenting a *prima facie* case of retaliation under the First Amendment.

> To make out a claim of unlawful retaliation by government officials in response to the exercise of his or her First Amendment right to petition, we have indicated three elements must be present. The plaintiff must show that (a) he or she was engaged in constitutionally protected activity; (b) the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (c) the defendant's adverse action was substantially motivated as a response to the

> plaintiff's exercise of constitutionally protected conduct.

Van Deelen v. Johnson, --- F.3d ----, 2007 WL 2309778, * 4 (10th Cir. 2007).

Under this standard, even if Ms. Mayer convinces this Court that the Seventh Circuit got it wrong and that her speech was indeed protected, she still flounders on the third element of her *prima facie* case of retaliation. The District Court found, as a matter of law, that the nonrenewal of Ms. Mayer's contract was based on her poor job performance and the parental complaints, not on her speech. App. 43a-48a. Ms. Mayer's failure to appeal this finding makes it impossible for her to meet the third element of her *prima facie* case on the First Amendment claims. Thus Ms. Mayer will lose her case even if this Court chooses to address her First Amendment claim, finds in her favor overturning the Seventh Circuit's decision, and remands the case.

Under these circumstances, this Court's "basic constitutional obligation of avoiding unnecessary decision of constitutional questions" comes into play and the Petition should be denied.

II. The Seventh Circuit properly applied *Garcetti* finding that in-class speech by an elementary school teacher is not protected by the First Amendment.

From the Respondents' perspective the question presented by Ms. Mayer answers itself. The question assumes, as it must, that Ms. Mayer's in-class speech on the Iraq war protests was made as an employee while teaching in the classroom and that her "speech is part and parcel of the approved curriculum ... ." In *Garcetti* this Court stated that

"[w]e hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.*, 126 S.Ct. at 1960. A teacher teaching in the classroom is perhaps the quintessential example of job related speech. Consequently, the Seventh Circuit, applying *Garcetti*, held that "the first amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system." App. 7a-8a.

A. Garcetti supports the Seventh Circuit's Decision.

Simply put, the Seventh Circuit got it right. This Court's decision in *Garcetti* resolved this question once and for all. Public employees, including primary and secondary school teachers such as Ms. Mayer, simply do not have a constitutional right to interject their own opinions when speaking as employees. As noted in some detail in the Statement of Facts, Ms. Mayer was a failing teacher headed for termination who sought to avoid this outcome by interjecting her personal opinions regarding the Iraq war into her elementary school classroom and then seeking to use this single instance of speech as a First Amendment shield to avoid the termination of her employment. This type of fact pattern is precisely why this Court in *Garcetti* refused to extend constitutional protection to public employee on the job speech: "Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'" *Garcetti*, 126 S.Ct. at 1959.

The Petitioner argues that this case falls outside the boundaries of *Garcetti* invoking the following language from the opinion:

> Second, Justice SOUTER suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. *See post*, at 1969 - 1970. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

Garcetti, 126 S.Ct. at 1962.

Justice Souter in his dissent in *Garcetti* noted his concern that:

> [t]his ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to official duties."

Garcetti, 126 S.Ct. at 1969 (Souter, J. dissenting). In making this argument Justice Souter relied on three cases, all from the college or university environment: *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). Each of these cases relies on the same basic proposition espoused in

Grutter: "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Id.*, 539 U.S. at 309. Based upon the special niche that universities occupy, the majority in Garcetti agreed that the issue of the interaction between the concepts of academic freedom and "expression related to academic scholarship" and a School's rights as an employer was a subject better left to another day. *Garcetti*, 126 S.Ct. at 1962.

The problem with applying the *Garcetti* exception to the present case is that this case involves an elementary school teacher and not a professor at a public university. This Court has never expanded the concept of academic freedom beyond the "special niche" occupied by colleges and universities. Indeed courts throughout the United States have routinely refused to permit primary and secondary school teachers the same academic freedoms as college and university professors because of the marked difference in the two environments ranging from the age of the students to the compulsory nature of primary and secondary education.

As Plato noted almost 2500 years ago: "For a young person cannot judge what is allegorical and what is literal; anything that he receives into his mind at that age is likely to become indelible and unalterable; and therefore it is most important that the tales which the young first hear should be models of virtuous thoughts." Plato's Republic: Book II, Jowett Translation, Walter J. Black, Inc., 1942, p. 281. Sir Edmund Burke noted the danger of permitting individual primary school teachers to control curriculum: "He ought to be fearful of putting into the hands of youth writers indulgent to the peculiarities of their own complexion, lest they should teach the humors of the professor, rather then the principles of the science." Letter to a Member of the National

Assembly (1791). IV, 23-34, found in The Philosophy of Edmund Burke, University of Michigan Press, 1960, p. 247. For these reasons, Justice Frankfurter noted that curricular control was one of four "essential freedoms" for schools. *Sweezy v. New Hampshire*, 354 U.S. 234, 255, 263-264 (1957).

Recognizing the essential freedom of public schools to determine for themselves what may be taught in their classrooms, this Court has acknowledged on many occasions the ability and the obligation of schools to control what is said and done in their names both by students and teachers.[1] Of particular concern to this Court has been the potential coercive effect of school sponsored speech on young students:

> As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Our decisions recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to

[1] *See e.g.* for students *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) and for teachers *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) and *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983).

> employ the machinery of the State to enforce a religious orthodoxy.

Lee v. Weisman, 505 U.S. 577 at 592 (citations omitted). This logic applies with equal force to other types of potentially coercive in-class speech by teachers.

While this Court has held schools to a fairly strict standard when it comes to the dangers of coercive speech, it has also traditionally given schools the latitude necessary to limit such speech that might be attributed to them, particularly where such speech takes place as part of the school's curriculum. For example, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) the Court held that where speech may be fairly attributed to a school, it has much greater freedom in restricting that speech. *Id.*, 484 U.S. at 273.

Thus longstanding precedent from this Court has established that our Nation's primary and secondary schools, as employers, have wide discretion to limit teacher speech in the classroom without falling afoul of the First Amendment because of the coercive nature of the speech, the youth of the students, and the captive nature of the audience: "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern." *Adler v. Board of Education*, 342 U.S. 485, 493 (1952).

B. There is no split in the Circuits regarding academic freedom rights.

The Circuit Courts have almost uniformly followed this Court's lead in refusing to recognize academic freedom rights outside of the college or university environment. For example, the Fifth Circuit in *Kirkland v. Northside Independent School District*, 890 F.2d 794 (5th Cir.1990)

noted that "[a]lthough the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curriculum. ... We hold only that public school teachers are not free, under the first amendment, to arrogate control of the curricula." *Id.*, 890 F.2d at 801-802.[2]

In each of the Circuit Court cases to address this issue the speech was that of a teacher/lecturer in a traditional classroom setting. Since such speech is clearly part of the school's curriculum, these courts found it to be school-sponsored, governed by *Hazelwood*, and the school was entitled to restrict that speech. The rationale of each of these cases therefore fully supports the Seventh Circuit's application of the *Garcetti* decision to in-class speech by primary and secondary school teachers such as Ms. Mayer regardless of the "academic freedom" reservation.[3]

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[2] *See e.g. Ward v. Hickey*, 996 F.2d 448, 452-453 (1st Cir.1993); *Silano v. Sag Harbor Union Free School Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2nd Cir.1994); *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3rd Cir.1998); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir.1998); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1007 (7th Cir.1990); *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 719 (8th Cir.1998); *DiLoreto v. Downey Unified School Dist. Bd. of Education*, 196 F.3d 958 (9th Cir.1999); *Miles v. Denver Public Schools*, 944 F.2d 773 (10th Cir.1991); *Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir.1991).

[3] The Eleventh Circuit in *Gilder-Lucas v. Elmore County Bd. of Educ.*, 2006 WL 1736833 (11th Cir.2006) also applied *Garcetti* to teacher speech: "We apply *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006), and conclude that Gilder-Lucas's speech was not protected by the First Amendment because she spoke 'pursuant to [her] official duties,' *Id.* at 1958."

The only Circuits to depart from this rationale in the primary and secondary school context and recognize an academic freedom right are the Sixth Circuit, which did so in *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1052 (6th Cir. 2001) and to some extent the Second Circuit in the 1972 decision of *James v, Bd. of Education*, 461 F.2d 566 (2nd Cir. 1972). Ms. Mayer understandably relies on these two decisions. (Petitioner's Brief, p. 16-17) Indeed she states that "Mayer's speech would have been protected if only she had taught in Ohio instead of Indiana." This conclusion is inaccurate. As the Seventh Circuit noted, "[t]he Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials. To the extent that *James v. Board of Education*, 461 F.2d 566 (2nd Cir. 1972), and *Cockrel v. Shelby County School District*, 270 F.3d 1036, 1052 (6th Cir. 2001), are to the contrary, they are inconsistent with later authority and unpersuasive." App. 6a-7a.

The Second Circuit in *Silano v. Sag Harbor Union Free School Dist. Bd. of Educ.*, 42 F.3d 719 (2nd Cir.1994), without mentioning the *James* decision by name, clearly appears to have repudiated that decision when it relied upon *Hazelwood* to reject a teacher's contention that his in-class speech was entitled to special First Amendment protection. *Id.*, 42 F.3d at 723-724. Similarly, the Sixth Circuit has also clearly called into question its decision in *Cockrel* where two of the three judges in *Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Village Sch. Dist.*, 428 F.3d 223 called for a review of the *Cockrel* decision in light of more recent cases: "I concur in Judge Sutton's concurring opinion, which calls for a re-examination of this circuit's First Amendment jurisprudence regarding in-class curricular speech." *Evans-Marshall*, 428 F.3d at 238 (Zatkoff, J. concurring in part, dissenting in part). Thus any reliance on

Cockrel as supporting the proposition that in-class speech is protected by the First Amendment is not well taken.[4]

Based on the foregoing discussion, rather than a split in circuits as suggested by Ms. Mayer, there appears to be remarkable unanimity in the lower courts regarding whether the concepts of academic freedom and academic scholarship apply in the elementary and secondary school context such that First Amendment protections should attach to that speech. The split and any dispute instead appears to rest solely in the post-secondary context where this Court has recognized some form of academic freedom exists. As the Seventh Circuit noted:

> Mayer's current-events lesson was part of her assigned tasks in the classroom; *Garcetti* applies directly. How much room is left for constitutional protection of scholarly viewpoints in post-secondary education was left open in *Garcetti* and *Piggee* and need not be resolved today. Nor need we consider what rules apply to publications (scholarly or otherwise) by primary and secondary school teachers or the statements they make outside of class. It is enough to hold that the first amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart

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[4] Any reliance on *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) which holds that speech on a matter of public concern does not lose its protected status because it occurs in a private setting, is also inapposite to the facts of this case. In *Givhan* the teacher complained privately outside of the classroom to the principal about racially discriminatory practices in the school not in class as part of her job.

> from the curriculum adopted by the school system.

App. 7a-8a (some citations omitted).

The Seventh Circuit's decision applying *Garcetti* to in-class speech by an elementary school teacher is fully consistent with that decision as well as existing precedent from this Court, nor is there a conflict among the circuits that would justify *certiorari*.

CONCLUSION

The petition should be denied.

Respectfully submitted,

Thomas E. Wheeler, II, Esq.
Locke, Reynolds, LLP
201 N. Illinois Street
P.O. Box 44961
Indianapolis, IN 46244-0961

Counsel for the Respondents

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